

Justice and Trust: The European Arrest Warrant and Human Rights

Submitted in fulfillment of the requirements of the Degree of Doctor of Philosophy

PhD (Laws)

Theodora .A. Christou

Supervisors: Professor Valsamis Mitsilegas and Merris Amos



Queen Mary, University of London

June 2013

I, Theodora Achillea Christou, confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below and my contribution indicated.

Previously published material is also acknowledged below.

I attest that I have exercised reasonable care to ensure that the work is original, and does not to the best of my knowledge break any UK law, infringe any third party's copyright or other Intellectual Property Right, or contain any confidential material.

I accept that the College has the right to use plagiarism detection software to check the electronic version of the thesis.

I confirm that this thesis has not been previously submitted for the award of a degree by this or any other university.

The copyright of this thesis rests with the author and no quotation from it or information derived from it may be published without the prior written consent of the author.

Signature:

A handwritten signature in black ink, appearing to read 'Theodora Christou', with a stylized, cursive script.

Date: June 2013

ABSTRACT

This thesis considers the relationship between human rights and the principle of mutual recognition as applied in criminal matters. It examines the impact of the European Arrest Warrant (EAW) on human rights and highlights the importance of human rights for the success of mutual recognition measures. Having embarked on the mutual recognition programme, on the basis of largely theoretical presumptions, an attempt by the EU to reposition human rights and to ensure that a genuine area of justice exists for all, can be witnessed through recent Directives on defence rights,.

This research addresses the scope and method of human rights protection with focus on the implementation of the EAW. In the first part, mutual recognition and the EAW are defined. The second part considers the practical effect of the EAW on human rights, setting out the ECHR minimum standards and the extended EU scope. The third part evaluates the defence measures adopted to date by the EU under the Stockholm Roadmap.

The final part summarises the main research findings which show that human rights are key to promoting mutual trust. The scope of some rights has already been extended and reinforced by the Charter of Fundamental Rights or the EU defence rights measures.

The thesis argues that the best method for reinforcing these rights in practice is a tripartite collaborative approach between the EU, Member States and the Council of Europe. In order to address the tension between human rights and mutual recognition, work needs to continue beyond adoption of the Stockholm measures. It requires genuine commitment on the part of the EU institutions and Member States for the necessary amendments, adoptions, implementation and human rights protection to take place and be reflected in practice.

Acknowledgments

I am grateful for the guidance of my supervisors Professor Valsamis Mitsilegas and Merris Amos; for the scholarship awarded to me by the School of Law of Queen Mary, University London; to my upgrade examiner Professor Jane Wright; and to my viva voce examiners Professor Elspeth Guild and Dr Adam Lazowski.

The successful completion of my PhD is without doubt due to the individuals I have been blessed with in my life and the opportunities I have been fortunate to encounter.

First and foremost I am blessed with parents who instilled in me the principle of philanthropy which led me onto the human rights path. They also taught me that anything is possible with conviction, hard work and dedication. Their unwavering support is what has enabled me to travel, study and work on issues that I am passionate about; they gave me my wings to change the world.

In addition to my parents and family I have been blessed with the opportunity to work with inspirational individuals from around the world. They have shown me that no one is above the law and working together we can take on injustices and win.

To avoid the inevitable, I will not list here all those individuals who have shown confidence in my work, those who have empowered me with their faith in my abilities, and those who have stood by my side - I hope that I have made my gratitude known to them already.

Table of Contents

ABSTRACT	3
Table of Contents.....	5
Abbreviations and Acronyms	8
Table of Cases	10
Table of Legislation	25
EU.....	25
Council of Europe.....	26
UN.....	26
UK.....	27
Acknowledgments	4
Introduction.....	28
Justice	28
Trust	29
The EAW	30
The Importance of Human Rights	32
Research Methodology	33
Part One: Mutual Recognition and the European Arrest Warrant.....	36
Chapter One: On the Principle of Mutual Recognition.....	36
1.1 As an Alternative	37
1.2 Origins.....	40
1.3 Misplaced Internal Market Analogy and Equivalence.....	41
1.4 Cooperation with a slice of Sovereignty.....	43
1.5 Individual free movement.....	44
1.6 Approximation, Harmonization and Mutual Recognition	46
Chapter Two: On the European Arrest Warrant Framework Decision	53
2.1 Scope	54
2.2 Changing terminology	54
2.3 Benefits: Deleting the Muddle.....	55
2.4 Is it Different to Extradition?	57
2.5 Implementation by the UK	66
2.6 Responsibility to Act Proportionately	69
2.7 Human Rights and the EAW.....	70

2.8 Existing Human Rights Protection.....	77
Chapter Three: Conclusion	79
Part II: Human Rights	82
Chapter Four: On Human Rights	82
4.1 Unavoidable Human Rights obligations.....	82
4.2 The Threefold Protection	84
4.3 Human Rights in the EU	86
4.4 EU Accession to the ECHR	93
Chapter Five: The Right to Liberty.....	104
5.1 Arrest.....	105
5.2 Detention.....	110
5.3 Bail.....	114
5.4 Executing State Obligations Under Application of Article 5.....	120
Chapter Six: Prohibited Treatment	126
6.1 Negative and Positive Obligations	128
6.2 Detention.....	129
6.3 Executing State Responsibility Under Article 3.....	135
6.4 A Closer Look at Article 3 and the EAW / The threshold.....	141
6.5 Principle of Equivalent Protection	147
6.6 An Asylum Analogy	152
6.7 To Conclude.....	161
Chapter Seven: Family and Private Life.....	164
7.1 The Right.....	164
7.2 Family Life.....	167
7.3 Alternatives to interference with Art 8.....	174
7.4 EU Citizens	185
7.5 Children.....	192
7.6 Private Life.....	205
7.7 The EAW and Family Life	208
Chapter Eight: A Fair Trial.....	211
8.1 Applicability to Extradition and the EAW	212
8.2 Applicability of Article 6 to the Executing Member State	214
8.3 A Flagrant Denial?.....	228
8.4 Fairness	233
8.5 Defence Rights.....	239
8.6 Pre-Trial	247
8.7 Right to Participate.....	249

8.8	Trials in Absentia.....	253
8.9	Right to Interpretation and Translation	259
8.10	Appeal.....	260
8.11	Is the Right to a Fair Hearing Relevant to the EAWFD?.....	261
Chapter Nine: Human Rights Conclusions.....		264
9.2	Rule 39 Interim Measure.....	274
Part III: EU Defence Rights and the EAW		278
Chapter Ten: The Lisbon Effect.....		278
Chapter Eleven: Approximation of Procedural Guarantees.....		281
11.1	The Need.....	282
11.2	The 2004 Proposal	284
11.3	The Objections.....	285
Chapter Twelve: Stockholm		289
12.1	Measure A	290
12.2	Measure B	292
12.3	Measures C and D.....	296
12.4	Measure E	303
12.5	Measure F	304
Chapter Thirteen: Added Value of EU Legislation		308
Part IV: Final Conclusions.....		316
Chapter Fourteen: Hysteron Proteron.....		316
14.1	Common standards first	316
14.2	Mutual Recognition Second	323
14.3	Are Amendments to the EAWFD Required?	324
14.4	Is the ECHR Enough or are Additional EU measures Required?	328
14.5	Has the EU law Adequately Addressed the Challenges?.....	331
Annexes		339
Annex 1: Extracts from the TFEU.....		339
Annex 2: Extracts from the ECHR.....		342
Annex 3: Extracts from the Extradition Act 2003.....		345
Annex 4: Table on prison populations across the EU.....		346
Annex 5: Extracts from the Charter of Fundamental Rights.....		347
Annex 7: Extracts from the Crime and Courts Act 2013 – the Forum Bar		351
Annex 8: Key Characteristics of the European Supervisory Order.....		358
Bibliography		359

Abbreviations and Acronyms

AFSJ	Area of Freedom, Security and Justice
CAT	United Nations Committee Against Torture
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPT	Council of Europe Committee for the Prevention of Torture
CRC	UN Convention on the Rights of the Child
EA	UK Extradition Act 2003
EAW	European Arrest Warrant
EAWFD	European Arrest Warrant Framework Decision
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
E-MS	Executing Member State
ESOFD	European Supervisory Order Framework Decision
EU	European Union
HR	Human Right or Fundamental Right
I-MS	Issuing Member State
MR	Mutual Recognition
MS(s)	Member State(s)
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNSCR	United Nations Security Council Resolution

Journals

CML Rev	Common Market Law Review
CYELS	Cambridge Yearbook of Legal Studies
E.J.L.R.	European Journal of Law Reform
E.L.Rev	European Law Review
ELJ	European Law Journal
EuConst	European Constitutional Law Review
Eur.J.Crime	European Journal of Crime, Criminal Law and Criminal Justice
Cr.L.Cr.J.	
Eur.J.Crime	European Journal of Crime, Criminal Law and Criminology
Cr.L.Criminology	
Eur.J.Int.Law	European Journal of International Law
GLJ	German Law Journal
HRLR	Human Rights Law Review
I.J.H.R	International Journal of Human Rights
ILSA J Int'l L	ILSA Journal of International and Comparative Law
J.Europ.Integration	Journal of European Integration
LCP	Law and Contemporary Problems
NJECL	New Journal of European Criminal Law
Rev.Int'l Dr.Penal	Revue Internationale de Droit Penal
Stat.L.R.	Statute Law Review
ULR	Utrecht Law Review
Vienna Online J. on Int'l Const. L.	Vienna online journal on international constitutional law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Table of Cases

EU

11/70 *Internationale Handesgesellschaft* [1970] ECR 1125

149/77 *Defence v Sabena* [1978] ECR 1365

222/84 *Johnston* [1986] ECR 1651

29/69 *Stauder* [1969] ECR 419

294/83, *Parti écologiste "Les Verts" v Européen Parlement* [1986] ECR 01339

36/75 *Rutili* [1975] ECR 1219

4/73 *Nold* [1974] ECR 491

44/79 *Hauer* [1979] ECR 3727

46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 02859

5/88 *Wachauf* [1989] ECR 2609

85/76 *Hoffmann-la Roche v. Commission* [1979] ECR 461

C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285

C-120/78 *Cassis de Dijon*, CJEU [1979] ECR 649

C-120/78 *Cassis de Dijon*, CJEU [1979] ECR 649

C-120/78 *Rewe-Zentral AG* [1979] ECR 00649

C-123/08, *Dominic Wolzenburg* [2009] ECR I-09621

C-135/08 *Rottman* [2010] ECR I-0000

C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979, Advocate-General Opinion

C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië* [2006] ECR I-09327

C-176/12 *Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouche-du-Rhône, Confédération générale du travail (CGT)*, 18 July 2013

C-187/01 & C-385/01 *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-01345

C-244/06, *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-00505, §39,

C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, [2011] ECR 00000

C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou*

- v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] ECR I-02925 (ERT)
- C-261/09, *Gaetano Mantello* [2010] ECR I-11477
- C-275/06 *Promusicae* [2008] ECR I-271
- C-288/05 *Criminal proceedings against Jürgen Kretzinger* [2007] ECR I-06441
- C-296/08 PPU *Extradition proceedings against Ignacio Pedro Santesteban Goicoechea* [2008] ECR I-06307
- C-297/07 *Klaus Bourquain* [2008] ECR I-09425
- C-303/05 *Advocaten voor de Wereld VZW* [2007] I-03633
- C-306/09 *I.B.* [2010] I-10341
- C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-01177
- C-355/04 *P Segi et al v Council* [2007] ECR I-1579
- C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] I-09609
- C-367/05 *Criminal proceedings against Norma Kraaijenbrink* [2007] ECR I-06619
- C-388/08 *Criminal proceedings against Artur Leymann et Aleksei Pustovarov* [2008] ECR I-08993
- C-396/11 *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu* [2013] ECR 00000
- C-399/11, *Stefano Melloni* [2013] ECR 00000
- C-402/05 P and C 415/05 P *Kadi and Al Barakaat* [2008] ECR I 6351
- C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E., A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2011] ECR 00000
- C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* [2008] ECR 0000
- C-436/04 *Van Esbroeck* [2006] ECR I-02333
- C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others ('ÖRF')* [2003] ECR I-4989
- C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921
- C-467/04 *Gasparini and others*, CJEU, 2006
- C-467/05, *Giovanni Dell'Orto* [2007] ECR I-05557
- C-469/03 *Criminal proceedings against Filomeno Mario Miraglia* [2005] ECR I-02009
- C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co v Council* [1991] ECR I-

03187

C-491/10 PPU *Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247

C-555/07 *Kucukdeveci* [2010] ECR I-0000

C-578/08 *Chakroun* [2010] ECRI-0000, §44

C-66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski* [2008] ECR I-06041

C-92/09 and C-93/09 *Volker und Markus Schecke GbR* [2010] ECR I-11063.

Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, (Grand Chamber) of 25 July

Case C-571/10 *Servet Kamberaj*, (Grand Chamber) 24 April 2012

Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, (Grand Chamber) of 26 February 2013

T-306/01 *Yusuf and Al Barakaat International Foundation v Council* [2005] ECR II-03533

T-315/01 *Kadi v Council and Commission*, [2005] ECR II-03649. See also C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-06351

ECHR

A and others v UK, Application No 3455/05, [GC] Judgment 19 February 2009

A v UK, Application No 25599/94, Judgment 23 September 1998

A.D. & O.D. v. UK, Application No 28680/06, Judgment 16 March 2010 §89

Abdolkhani and Karimnia v. Turkey, Application No. 30471/08, judgment of 22 September 2009

Ahmed v Austria, Application No 25964/94, Judgment of 17 December 1996

Airey v Ireland, Application No 6289/73, Judgment 9 October 1979

Al-Adsani v UK, Application No 35763/97, Judgment 21 November 2001

Albert and Le Compte v Belgium, Application Nos 7299/75, 7496/76, Judgment 10 February 1983

Alver v Estonia, Application No 64812/01, Judgment 8 November 2005

Amman v Switzerland, Application No 27798/95, [GC] Judgment 16 February 2000

Artico v Italy, Application No. 6694/74, Judgment 15 May 1980

Ashingdane v. UK, Application No 8225/78, Judgment 28 May 1985)

Assenov v Bulgaria, Application No 24760/94, Judgment 28 October 1998

- Bader and Kanbor v Sweden*, Application No 13284/04, Judgment 8 November
- Barbera, Messegue and Jabardo v Spain*, Application No 10590/83, Judgment 6 December 1988
- Behrami and Behrami v France* (Application No. 71412/01) and *Saramati v France, Germany and Norway*, (Application no. 78166/01, Admissibility Decision 2 May 2007
- Bendenoun v. France*, Application No 12547/86, Judgment 24 February 1994
- Benham v UK*, Application No 19380/92, Judgment 10 June 1996
- Bezicheri v. Italy*, Application No 11400/85, 25 October 1989
- Biba v Greece*, Application No 33170/96, Judgment 26 September 2000
- Boguslaw Krawczak v. Poland*, Application No 24205/06, judgment 31 May 2011
- Boutlif v Switzerland*, Application No 54273/00, Judgment 2 August 2001
- Boyle and Rice v UK*, Application Nos 9659/82 and 9658/82, Judgment 27 April 1988
- Bozano v. France*, Application No 9990/82, judgment of 18 December 1986; *Čonka v. Belgium*, no. 51564/99, Judgment 5 February 2002
- Brennan v UK*, Application no. 39846/98, Judgment 16 October 2001
- Brogan and Others v. UK*, Application Nos 11209/84, 11234/84, 11266/84, 11386/85, 29 November 1988
- Bruncko v. Slovakia*, Application No 33937/06, judgment 3 November 2011
- Bujac v. Romania* (37217/03, judgment 2 November 2010)
- Caballero v. UK*, Application No 32819/96, Judgment 8 February 2000
- Campbell and Fell v UK*, Application Nos 7819/77, 7878/77, Judgment 28 June 1984
- Chahal v UK*, Application No 22414/[GC] Judgment 11 November 1996
- Chamaiev and others v Russia*, Application No 36378/02, Judgment 12 April 2005
- Chapman v UK* Application No 27238/95, [GC] Judgment 18 January 2001
- Clooth v. Belgium*, Application No 12718/87, Judgment 12 December 1991
- Colozza v Italy*, Application No 9024/80, Judgment 12 February 1985
- Čonka v. Belgium*, Application no. 51564/99, Judgment 5 February 2002
- Copland v UK*, Application No 62617/00, Judgment 3 April 2007
- Crabtree v. The Czech Republic*, Application No 41116/04, judgment 25 February 2010)
- Croissant v Germany*, Application No 13611/88, Judgment 25 September 1992
- Cyprus v Turkey*, Application No.25781/94, [GC] judgment 10 May 2001
- Daktaras v Lithuania*, Application No 42095/98, Judgment 10 October 2000

- Degeratu v. Romania*, Application No 35104/02, judgment 6 July 2010
- Dermanovic v Serbia*, Application No 4897/06, Judgment 23 February 2010
- Deweert v Belgium*, Application No 6903/75, Judgment 27 February 1980
- Douglas-Williams v UK*, Application No 56413/00, Admissibility Decision 8 January 2008
- Dougoz v Greece*, Application No 40907/98, Judgment 6 March 2001
- Dowsett v UK*, Application No 39482/98, Judgment 24 June 2003
- Drozd and Janousek v France and Spain*, Application No 12747/87, Judgment 26 June 1992
- EB v UK*, Application No 63019/10.
- Eckle v Germany*, Application No 8130/78, Judgment 15 July 1982
- Edwards and Lewis v UK*, Application Nos 39647/98, 40461/98, Chamber Judgment 22 July 2003
- Edwards and Lewis v UK*, Applications nos. 39647/98 and 40461/98, [GC] Judgment 27 October 2004
- Einhorn v France*, Application No 71555/01, Decision 16 October 2001
- Ekbatrin v Sweden*, Application No 10563/83, Commission Report 7 October 1986
- Engel and Others v the Netherlands*, Application Nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment 8 June 1976
- Ewan Quayle Launder v UK*, Application No. 27279/95, Commission Decision 8 December 1997
- Farmakopoulos v. Belgium*, Application No.11683/85, Decision 8 February 1990
- Fejde v Sweden*, Application No. 12631/87, judgment 29 October 1991
- Fox, Campbell and Hartley v. United Kingdom*, Application Nos 12244/86, 12245/86, 12383/86, Judgment 30 August 1990
- Funke v France*, Application No 10828/84, Judgment 25 February 1993
- Gaforov v Russia*, Application no. 25404/09, judgment 21 October 2010 §208
- Garcia Alva v Germany*, Application no. 23541/94, 13 February 2001
- Garcia Ruiz v Spain*, Application No 30544/96, Judgment 21 January 1999
- Gasins v. Latvia*, Application No 69458/01, judgment 19 April 2011
- Gasparini v Italy and Belgium*, Application No 10750/03, Admissibility Decision 12 May 2009
- Geerings v the Netherlands*, Application No. 30810/03, Judgment 1 March 2007
- Giza v Poland*, Application No 1997/11, Decision 23 October 2012
- Glass v UK*, Application No 61827/00, Judgment 9 March 2004

- Granger v UK*, Application No 11932/86, Judgment 28 March 1990
- Guzzardi v. Italy*, Application No 7367/76, Judgment 6 November 1980
- H and M Eckle v Federal Republic of Germany*, Application No 8130/78, Commission Report 11 December 1980
- H v Spain*, Application No. 10227/82, Decision 15 December 1983, 93
- H.L.R. v. France*, Application No. 24573/94, Judgment 29 April 1997
- Hadjianastassiou v Greece* (Application no. 12945/87, Judgment 16 December 1992
- Haidn v. Germany* (6587/04, judgment 13 January 2011)
- Hakansson and Stureson v Sweden*, Application No 11855/85, Judgment 21 February 1990
- Hammern v. Norway*, Application no. 30287/96, 11 February 2003
- Haralampiev v Bulgaria*, Application No 29648/03, Judgment 24 April 2012
- Hatton and others v UK*, Application no. 36022/97, [GC] Judgment 8 July 2003
- Hauschildt v Denmark*, application No. 10486/83, Judgment 24 May 1989
- Heany and McGuinness v Ireland*, Application no. 34720/97, Judgment 21 December 2000
- Hibbert v Netherlands*, Application No 38087/97, Judgment 26 January 1999
- Hilal v. UK*, Application No. 45276/99, Judgment 6 March 2001
- Hornsby v Greece*, Application No. 18357/91, Judgment 19 March 1997
- Hristova v. Bulgaria*, Application No. no. 60859/00, Judgment 7 December 2006
- Husain v Italy*, Application 18913/03, Decision 24 February 2005
- Hüseyin Habip Taşkin v Turkey*, Application no. 5289/06, Judgment 11 February 2011
- Idalov v Russia*, Application No 5826/03, Judgment 22 May 2012
- Ireland v. UK*, Application No 5310/71, Judgment 18 January 1978
- Ismoilov and Others v Russia*, Application no. 2947/06, judgment 24 April 2008
- Jablonski v Poland*, Application No 33492/96, Judgment 21 December 2000
- Jalloh v Germany*, Application No 54810/00, [GC] Judgment 11 July 2006
- Jecius v Lithuania*, Application No 34578/97, Judgment 31 July 2000
- Jendrowiak v. Germany*, Application No 30060/04, judgment 14 April 2011
- Jiga v. Romania*, Application No 14352/04, judgment 16 March 2010
- John Murray v UK*, Application no. 18731/91, [GC] Judgment 8 February 1996
- José Alejandro Peñafiel Salgado v. Spain*, Application No 65964/01, Decision 16 April 2002

Jussila v. Finland, Application No. 73053/01, [GC] Judgment 23 November 2006

K and F v UK, Application No. 12543/86, Decision 2 December 1986, 272

K. and T. v. Finland, 25702/94, [GC] Judgment 12 July 2001

K.R.S. v UK, Application No 32733/08, Decision 2 December 2008

Kalashnikov v. Russia, Application No 47095/99, Judgment 15 July 2002

Kamasinski v Austria, Application No 9783/82, Judgment 19 December 1989

Kanagaratnam and Others v Belgium, Application No 15297/09, Judgment 13 December 2011

Karalevičius v. Lithuania, Application No 53254/99, Judgment 7 April 2005

Kauczor v Poland, Application No 45219/06, Judgment 3 February 2009

Keenan v UK, Application No 27229/95, Judgment 3 April 2001

Keus v. Netherlands, Application No 12228/86, 25 October 1990

Khamidov v Russia, Application No 72118/01, Judgment 15 November 2007

Kirkwood v UK, Application No 10479/83, Decision 12 March 1984

Klass and others v Germany, Application No 5029/71, Judgment 6 September 1978

Kleuver v Norway Application No 45837/99, Decision 30 April 2002

Kremzow v Austria, Application No. 12350/86, Commission Report 20 May 1992

Kudla v Poland, Application No 30210/96, Grand Chamber Judgment 26 October 2000

Labita v Italy, Application No 26772/95, Judgment 6 April 2000

Ladent v Poland, Application No 11036/03, Judgment 18 March 2008

Lala v the Netherlands, Application No 14861/89, Judgment 22 September 1994

Lamy v. Belgium, Application No 10444/83, 30 March 1989

Lavents v Latvia, Application No 58442/00, Judgment 28 November 2002

Letellier v. France, Application No 12369/86, Judgment 26 June 1991

Lexa v Slovakia, Application No 54334/00, Judgment 23 September 2008

Lorrain Esme Osman v UK, Application No 10479/83, Decision 12 March 1984

Lorse v. Netherlands, Application No 52750/99, Judgment 4 February 2003

Luberti v. Italy, Application No 9019/80, Judgment 23 February 1984

Luedicke Belkacem and Koç v Germany, Application Nos 6210/73, 6877/75, 7132/75, Judgment 10 March 1980

Lynas v Switzerland, Application No 7317/75, Commission Decision 6 October 1976

- M.S.S. v Belgium and Greece*, Application No 30696/09, Judgment 21 January 2011
- Magee v UK*, Application no. 28135/95, Judgment 6 June 2000
- Malkov v. Estonia* (31407/07, judgment 4 February 2010)
- Malone v UK*, Application No 8691/79, Judgment 2 August 1984
- Mamatkulov and Abdurasulovic v. Turkey*, Applications nos. 46827/99 and 46951/99, [GC] Judgment 4 February 2005
- Marckx v Belgium*, Application No 6833/74, Judgment 13 June 1979
- Marttinen v Finland*, Application no. 19235/03, Judgment 21 April 2009
- Maslov v Austria*, Application No 1638/03, [GC] judgment 23 June 2008
- Mathew v. the Netherlands*, Application No 24919/03, Judgment 29 September 2005
- Mattoccia v Italy*, Application No 23969/94, Judgment 25 July 2000
- McFeeley and others v. UK*, Application No 8317/78, Judgment 15 May 1980
- Messina v Italy (No 2)*, Application No 25498/94, Judgment 28 September 2000
- Mirosław Garlicki v. Poland*, Application No 36921/07, judgment 14 June 2011
- Mohammed Ali Hassan Al-Moayad v Germany*, Application No 35865/03, Decision 20 February 2007
- Monedero Angora v Spain*, Application No 41138/05, Decision, 7 October 2008
- Monnell and Morris v UK*, Application Nos 9562/81, 9818/82, Judgment 2 March 1987
- Mooren v Germany*, Application no. 11364/03, [GC] Judgment 9 July 2009
- Moser v Austria* Application No 12643/02, Judgment 21 September 2006
- Moulin v. France* (37104/06, judgment 23 November 2010)
- Moustaquim v Belgium*, Application No 12313/86, Judgment 18 February 1991
- Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Application No 13178/03, Judgment 12 October 2006
- Murray v UK*, Application No 14310/88, Judgment 28 October 1994
- Muskhadzhiyeva and Others v Belgium*, Application No 41442/07, Judgment 19 January 2010
- Maaoui v France*, Application No. 39652/98, [GC] Judgment 5 October 2000
- Maaoui v France*, Application no. 39652/98, [GC], Judgment 5 October 2000
- N.A. v. UK*, App. No. 25904/07, judgment of 17 July 2008
- Nazarenko v. Ukraine*, Application No 39042/97, Judgment 29 April 2003
- Nerattini v. Greece*, Application No 43529/07, 18 December 2008

Neulinger and Shuruk v. Switzerland, Application No 41615/07, Judgment 6 July 2010

Neumeister v. Austria, Application No 1936/63 ,27 June 1968; *Letellier v. France*, Application No 12369/86, Judgment 26 June 1991

Nicut- Tănăsescu v. Romania, Application No 25842/03, judgment 6 July 2010

Niemietz v Germany, Application No 13710/88, Judgment 16 December 1992

Niemietz v Germany, Application no. 13710/88, Judgment 16 December 1992

Nikolova v Bulgaria (No 2), Application No 40896/98, Judgment 30 September 2004

O.H. v. Germany, Application No 4646/08, judgment 24 November 2011

Olaechea Cahuas v Spain, Application no. 24668/03, Judgment 10 August 2006

Olsson v Sweden (No 1), Application No 10465/83, Judgment 24 March 1988

Orchowski v. Poland, Application No 17885/04 Judgment 22 October 2009

Osman v UK, Application No 87/1997/871/1083, Judgment 28 October 1998

P., C. and S. v. UK, Application No 56547/00, Judgment 16/07/2002

P., R.H. and L.L v UK, Application No. 15776/89, Decision 12 May 1989

Padalov v Bulgaria, Application No 54784/00, Judgment 10 August 2006

Panovits v Cyprus, Application no. 4268/04, Judgment 11 December 2008

Peck v UK, Application No 44647/98, Judgment 28 January 2003

Peers v Greece, Application No 28524/95, Judgment 19 April 2001

Petkov v. Bulgaria (32130/03, judgment 7 January 2010)

Pishchalnikov v Russia, Application No 7025/04, Judgment 24 September 2009

Pretty v. UK, Application No 2346/02, Judgment 29 April 2002

Quinn v France, Application No 18580/91, Judgment 22 March 1995

RAF v Spain, Application No 53652/00, Decision 21 November 2000

Raidl v. Austria, Application No. 25342/94, Decision 4 September 1995

Raza v Bulgaria, Application No 31465/08, Judgment 11 February 2010.

RD v Poland, Application Nos 29692/96, 34612/97, Judgment 18 December 2001

Rehbock v Slovenia, Application No 29462/95, Judgment 20 May 1998

Riad and Idiab v Belgium, Application Nos 29787/03 and 29810/03, Judgment 24 January 2008

Ribitsch v Austria, Application No 18896/91, Judgment 4 December 1995

Ringeisen v Austria, Application No 2614/65, Judgment 16 July 1971

- Rotaru v Romania*, Application No 28341/95, [GC] Judgment 4 May 2000
- S and Marper v UK*, Application No 30562/04, 30566/04, [GC] Judgment 4 December 2008
- S.A. Dangeville v. France*, Application no. 36677/97, Judgment 16 April 2002
- Salah Sheekh v the Netherlands*, Application No 1948/04, Judgment 11 January 2007
- Salduz v Turkey*, Application No. 36391/02, [GC] Judgment 27 November 2008
- Sanchez-Reisse v. Switzerland*, Application No 9862/82, Judgment 21 October 1986
- Sardinas and Alba v Italy*, Application No 56271/00, Judgment 17 February 2005
- Savenkovas v Lithuania*, Application No 871/02, Judgment 18 November 2008
- Schummer v. Germany (No.1)*, Application No 27360/04 ; 42225/07, judgment 13 January 2011
- Scott v Spain*, Application No 21335/93, Judgment 18 December 1996
- Scundeanu v. Romania* (10193/02, judgment 2 February 2010)
- Sejdovic v Italy*, Application no. 56581/00, [GC] Judgment 1 March 2006
- Selmouni v France*, Application No25803/94, Judgment 28 July 1999
- Shamayev and Others v Georgia and Russia*, Application No. 36378/02, judgment 12 October 2005, §338
- Silver and Others v UK*, Application Nos 5947/72 and 6 others, Judgment 25 March 1983
- Şirketi Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, Application No 45036/98, [GC] Judgment 30 June 2005
- Slivenko v Latvia*, Application No 48321/99, Judgment 9 October 2003
- Smirnova v Russia*, Application No 46133/99, Judgment 24 July
- Soering v UK*, Application No.14038/88, judgment 7 July 1989
- Stapleton v Ireland*, Application no. 56588/07, Decision 4 May 2010
- Steel and Morris v UK*, Application No 68416/01, Judgment 15 February 2005
- Stephens v Malta (No.1)*, Application No 11956/07, Judgment 21 April 2009
- Sunday Times v UK*, Application No 6538/74, Judgment 26 April 1979
- Svetoslav Hirstov v. Bulgaria* (36794/03, judgment 13 January 2011)
- Saadi v Italy*, Application No 37201/06, [GC] Judgment 28 February 2003
- Saadi v UK*, Application No 13229/03, [GC] Judgment 29 January 2008
- T. v UK*, Application no. 24724/94, [GC] Judgment 16 December 1999
- T.I. v UK*, Application No 43844/98, Decision 7 March 2000

T.P. and K.M. v UK Application No 28945/95, Judgment 10 May 2001

Talat Tunc v Turkey, Application No 32432/96, Judgment 27 March 2007

Tănăsescu v. Romania, 25842/03, judgment 6 July 2010

Teixeria de Castro v Portugal, Application No 25829/94, Judgment 9 June 1998

Telfner v Austria, Application no. 33501/96, Judgment 20 March 2001

Timergaliyev v Russia, Application No 40631/02, Judgment 14 October 2008

Togher v UK Application No 28555/95, Commission Report 25 October 1999

Tomasi v France, Application No 12850/87, Judgment 27 August 1992

Trzaska v Poland, Application No 25792/94, Judgment 11 July 2000

V v UK, Application No. 24888/94, [GC] Judgment 16 December 1999

Valašinas v Lithuania, Application No 44558/98, Judgment 24 July 2001

Van der Ven v. the Netherlands, Application No 50901/99, Judgment 4 February 2003

Vilvarajah and Others v. the UK, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87, Judgment 30 October 1991

Weeks v. UK, Application No 9787/82, 2 March 1987

Wegera v. Poland, 141/07, judgment 19 January 2010)

Wellington v UK, Application No. 60682/08, Admissibility Decision 5 October 2010
Krzyzak v Poland [2012] EWHC 810 (Admin)

Wemhoff v. Germany, Application No 2122/64, Judgment 27 June 1968

Whitehead v Italy, Application No 13930/88, Decision 11 March 1989

Winterwerp v. Netherlands, Application No 6301/73, 24 October 1979

X, Y and Z v UK, Application No 21830/93, Judgment 22 April 1997

X. v Norway, Application No 7945/77, Decision 4 July 1978, 228

X. v UK, Application No 29392/95, Judgment 10 May 2001

X. v. Austria, Application no. 1918/63, Commission decision of 18 December 1963, 492

X. v. UK, Application No 7215/75, 5 November 1981

Y. v. Norway, Application no. 56568/00, Judgment 11 February 2003

Üner v the Netherlands, Application No 46410/99, Judgment 18 October 2006

Yoh-Ekale Mwanje v. Belgium, Application No 10486/10, Judgment 20 December 2011

Zollmann v UK, Application No 62902/00, judgment 27 November 2003

Zoon v the Netherlands (Application no. 29202/95, Judgment 7 December 2000)

Öcalan v Turkey, Application No 46221/99, [GC] Judgment 12 May 2005, Chamber Judgment 12 March 2003

Öztürk v. Germany, Application No 8544/79 , Judgment 21 February 1984

UN

Kindler v Canada, Application No 470/1991, 30 July 1991, CCPR/C/48/D/370/1990

Ng v Canada, CCPR/C/49/D/496/1991 (1993)

National Cases

UK Cases

(1) *BH and (2) KAS or H v The Lord Advocate and another (Scotland)* UKSC 2011/0217 and UKSC 2011/0210

(1) *Habib Ignaoua*, (2) *Mohamed Salah Ben Hamadi Khemiri & (3) Ali Ben Zidane Chehidi v The Judicial Authority of the Courts of Milan, The Serious and Organised Crime Agency, The Secretary of State for the Home Department* [2008] EWHC 2619 (Admin)

(1) *The Queen (on the application of) HH v City of Westminster Magistrates Court*, (2) *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa* (3) *X, Y and Z* [2011] EWHC 1145 (Admin)

AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801

Agius v the Court of Magistrates, Malta [2011] EWHC 759 (Admin)

Agiza v Sweden, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005)

Assange v Swedish Prosecution Authority [2012] UKSC 22, §79

Assange v The Swedish Prosecution Authority [2012] UKSC 22

Balsevics v Latvia [2012] EWHC 813 (Admin)

Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39

Boguslaw Oraczko v District Court in Krakow [2008] EWHC 904 (Admin).

Boudhiba v National Court of Justice, Madrid [2006] EWHC 167 (Admin).

C-157/96 National Farmers' Union and Others [1998] ECR I-2211

Caesar Carvalho v Secretary of State for the Home Department and Secretary of State for the Home Department v Omar Abdullah Omar [2010] EWCA Civ 1406

Caldarelli (Appellant) v Court Of Naples (Respondents) [2008] UKHL 51 House of Lords, 30 July 2008

Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy [2008] 1 WLR

1724 §24

Campbell v Her Majesty's Advocate [2008] Scot HCJAC (26 February 2008)

Dabas v High Court of Justice Madrid [2007] UKHL 6

Dabas v High Court of Justice, Madrid [2007] UKHL 6.

Dabowski v Poland [2010] EWHC 1712 (Admin)

Dziedzic v Germany [2006] EWHC 1750 (Admin)

Edward Jaworski v Regional Court Katowice, Poland [2008] EWHC 858 (Admin)

Gomes v Government of the Republic of Trinidad and Tobago [2009] UKHL 21

Harvey v Tribunal Judicial de Albufeira, Portugal [2007] EWHC 3282

HH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); FK (FC) (Appellant) v Polish Judicial Authority (Respondent), [2012] UKSC 25

Janiga v Ustinad Labem Regional Court Czech Republic [2011] EWHC 553 (Admin)

Jansons v Latvia [2009] EWHC 1845 (Admin)

Jaso & Ors v Central Criminal Court No.2 Madrid [2007] EWHC 2983 (Admin)

Jaworski v Regional Court Katowice, Poland [2009] EWHC 858

Julian Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin)

Justin Surendran Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1 IAT

La Torre v Italy [2007] EWHC 1370 (Admin)

Lisowski v Regional Court of Bialystok [2006] EWHC 3227 (Admin)

Lisowski v Regional Court of Bialystok [2006] EWHC 3227 Admin.

Louca v the Office of the Public Prosecutor in Bielefeld, Germany and others, [2008] EWHC 2907 Admin

Maumousseau and Washington v France, Application No 14600/05, Decision 6 December 2005

Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams [2010] EWCA Civ 9

Moulai v Deputy Public Prosecutor of Creteil, France [2009] EWHC 1030 (Admin)

Nawara v Poland [2011] EWHC 3725 (Admin)

Norris v Government of United States of America [2010] UKSC 9

Office of the King's Prosecutor, Brussels v Cando Armas and another [2005] UKHL 67

Ogonowski v Poland [2007] EWHC 2445 (Admin)

Oraczko v District Court of Krakow [2008] EWHC 904 Admin

Owens v Spain [2009] EWHC 1243 (Admin)

Pilecki v Circuit Court of Legnica, Poland [2008] UKHL 7

R (B) v Regional Court of Elbag [2010] EWHC 2958 (Admin)

R (on the application of Bermingham and others) v Director of the Serious Fraud Office; Bermingham and others v Government of the United States of America [2006] EWHC 200 (Admin)

R (on the application of Wellington) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice) [2008] UKHL 72

R (Ullah) v Special Adjudicator [2004] 2 A C 323

R v Secretary of State for the Home Department ex parte Razgar (FC) [2004] UKHL 27

R. (on the application of Brand) v Poland [2012] EWHC 379 (Admin)

R. (on the application of Klimas) v Lithuania [2010] EWHC 2076 (Admin)

Re Ismail (Application for Writ of Habeas Corpus) [1998] UKHL 32

Regina Ex Parte Ullah v Special Adjudicator and Do v Secretary of State for the Home Department [2004] UKHL 26

S v Poland [2010] EWHC 915 (Admin)

Symeou v Greece [2009] EWHC 897 (Admin)

T-195/08 Antwerpse Bouwwerken NV v European Commission [2009] ECR II-4439

Targosinski v Judicial Authority of Poland [2011] EWHC 312 (Admin)

The Criminal Court at the National Court, 1st Division (a Spanish Judicial Authority) v Murua [2010] EWHC 2609 (Admin)

The Queen on the Application of Jan Rot v District Court of Lublin, Poland [2010] EWHC 1820,

Valts v Latvia [2010] ECHC 999 (Admin)

Zakrzewski v The Regional Court in Lodz, Poland, [2013] UKSC 2 §8

ZH (Tanzania) [2011] UKSC 4

Cyprus

David Scattergood (2005) 1A AAD 142

Germany

Oberlandesgericht Stuttgart, 26 October 2006, 3 Ausl 52/06

Ireland

Minister for Justice & Equality v Rajki 2012 IEHC 270

Minister for Justice, Equality & Law Reform v Rettinger [2010] IESC 45

MJE v Siwy [2011] IEHC 252

MJELR v Mazurek [2011] IEHC 204

Netherlands

Case AU7667, *Rechtbank Amsterdam*, 2006

Supreme Court, 8 July 2008, LJN BD2447

Northern Ireland

Lithuania v Liam Campbell [2013] NIQB 19

South Africa

S v M (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC)

Table of Legislation

EU

- Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, OJ L 239, 22 September 2000 P. 0019-0062 (CISA)
- Council Framework Decision 2002/475 on Combating Terrorism , OJ L-164, 22 June 2002, 3–7 as amended by Council of the European Union, Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330, 9 December 2008, 21–23
- Council Framework Decision 2002/475 on Combating Terrorism, 13 June 2002
- Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States, 13 June 2002, -002/584/JHA as amended by Council of the European Union, Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 L 81 of 2009-03-26, 24-36 (EAWFD)
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purposes of their enforcement in the European Union, deadline for implementation 5 December 2012 (Prisoner Transfer FD)
- Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Trials in Absentia FD)
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294 of 11.11.2009 (ESOFD)
- Council Framework Decision for the establishment of Eurojust, Council, 2002/475/JHA
- Council Framework Decision on Combating Terrorism, Council, 2002/475/JHA
- Council Framework Decision on the application of the principle of mutual recognition to financial penalties, 2005/214/JHA, 24 February 2005, OJ L 076 0016 - 0030
- Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, 2002/584/JHA, OJ L190, 13 June 2002
- Council Framework Decision setting up Eurojust with a view to reinforcing the fight against serious crime, 28 February 2002
- Council Framework Decision Setting up Eurojust with a view to reinforcing the fight against

serious crime, 2002/187/JHA

Council, Framework Decision on Combating Terrorism, 2002/475/JHA

Council Framework Decision on the application of the principle of mutual recognition to financial penalties, 2005/214/JHA 24 February 2005

Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Regulation)

Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004, 77–123 (Citizens Directive)

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1 of 1 June 2012

Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306 of 17 December 17.10.2007. Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, OJ C 115 of 09.05.2008 (Lisbon Treaty)

Treaty of the European Union 1992, Article K2 of Title VI.

Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, OJ C 325/5, 24 December 2002

Council of Europe

Council of Europe, European Convention on Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950

Council of Europe, European Convention on Extradition, Paris, 13.XII.1957

Council of Europe, Treaty No.112, entered into force 1 July 1985

UN

International Covenant on Civil and Political Rights

Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/Conf. 183/9

Statute of the International Tribunal for Rwanda UN Doc. S/INF/50 (1994)

Statute of the International Tribunal for the Former Yugoslavia, UN Doc. S/2-5704 (1993)

UN Convention against Torture and its Optional Protocol

Universal Declaration of Human Rights

UK

Children Act 2004

Extradition Act 2003

Human Rights Act 1998

Policing and Crime Act 2009

The Crime and Courts Act 2013

Introduction

An unwelcome outcome of the four freedoms of the European Union (EU) is what Professor Spencer classifies as the ‘fifth freedom’ that of crime and criminals moving freely between Member States (MS).¹ This ‘fifth freedom’ is one reason why the EU deemed it necessary to broaden their scope from the original economic mandate to include the criminal sphere. More generally this new field is referred to as the creation of an Area of Freedom, Security and Justice (AFSJ).²

Justice

The concept of an AFSJ³ is relatively new in the EU and covers a broad and diverse range of areas including asylum, immigration, civil procedure, police cooperation, drug trafficking, counter terrorism, HRs and criminal matters. The focus of this thesis will be on the final two areas; criminal law and human rights (HR)⁴ and the impact of the principle of mutual recognition (MR) on these.⁵ This will be illustrated by putting under the microscope the European Arrest Warrant (EAW).

As early as 1977 the then French President Giscard d’Estaing envisaged EU cooperation in criminal law giving protection of the four freedoms as a reason for the need to focus on security and justice.⁶ It was not until 1992 in Maastricht that reference was made to

¹ John Spencer, ‘EU Criminal Law – the Past and the Future?’, in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (Eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011. The four freedoms are free movement of goods, capital, services, and people.

² The Commission considers freedom, security and justice as integral key values of EU society.

³ Full consideration of developments in the AFSJ is beyond the scope of this thesis. What is set out here is only a brief and general introduction to the field. For a more detailed account see Steve Peers, *EU Justice and Home Affairs Law*, (3rd Edn), OUP, 2011, Valsamis Mitsilegas, *EU Criminal Law*, Hart Publishing, 2009.

⁴ Throughout HRs and fundamental rights will be used interchangeably.

⁵ An indicative list of different measures passed in this area can be found in, K. Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, (2010) ICLQ Vol. 59, 255-301

⁶ Oreste Pollivino, *EAW and Constitutional Principles of the Member States: A case law-based outline in the attempt to strike the right balance between interacting legal systems*, GLJ, (2008) Vol.09 No.10 1316. He also lists as the only significant achievement between 1977 and the 1990s as the Dublin Agreement 1979 relating to the implementation of the 1977 Strasbourg Treaty on the repression of terrorism, is followed by an overview of the European integration of criminal law.

the creation of an AFSJ in a Treaty.⁷ In 1997, in the Treaty of Amsterdam, creation of an AFSJ became an objective for the EU and in 1999 the Tampere programme “set out policy guidelines and practical objectives”⁸ for an AFSJ.⁹

As for EU Criminal Justice, it exists in the loosest sense of the word. There is no European Criminal/Penal Code or anything similar to that proposed by the *Corpus Juris* project,¹⁰ but instead it is a collection of organisations¹¹ and of instruments¹² working simultaneously with national criminal justice systems of MSs. Creation of criminal law or its reform within the EU differs from the traditional process at the national level of states. The AFSJ is not an autonomous system but, “a conceptual creation for the cooperation between such autonomous systems of criminal justice set up for the specific purpose of adapting these systems to the realities of a borderless Europe” whilst the only two parameters at the national level are “the need for effective enforcement of the criminal law and the just limits to state power over the individual”.¹³

Trust

The principle of MR provides the primary framework for EU measures in criminal matters. The adoption of this principle is regarded by many as an alternative to

⁷ EU, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7.02.1992, OJ C 325/5, 24.12.2002

⁸ Commission, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations* (COM(2004) 401 final), 2.06.2004

⁹ At this point, transparency of decision-making was affected due to lack of equal co-legislator powers of the European Parliament and the fact that once adopted there was very limited ability to evaluate whether implementation was effective. The Court of Justice of the EU (CJEU) also had a “limited role” and the Commission itself had “restricted powers” with regards to police and judicial cooperation in criminal matters.

¹⁰ A proposal in 1997 presented by a group of legal experts proposing the development of a European Criminal Code. The text and various commentaries are available at <http://people.exeter.ac.uk/watupman/jha/jha/corppjur> accessed 17.05.2013

¹¹ Such as OLAF, Europol and Eurojust. See Mitsilegas, *EU Criminal Law* (n 3).

¹² These instruments include mutual recognition measures (such as the EAWFD); instruments on substantive criminal law (i.e. the Council Framework Decision on human trafficking) and criminal procedure (such as the measures set to be adopted in accordance with the Stockholm Roadmap).

¹³ Robin Lööf, *Shooting from the Hip: Minimum Rights in Criminal Proceedings throughout the EU*, ELJ, (2006) Vol. 12 No 3, 421-430, 422

harmonization of the EU MS criminal justice systems, preserving their sovereignty in this politically sensitive area (although future harmonization remains a possibility).

MR is founded on a mutual trust in the existence of due process and ability of another MS's legal system to safeguard HRs. This mutual trust is essentially based on the fact that all MSs are bound by the European Convention on Human Rights (ECHR); whilst in theory this is correct, this is not reflected in the practice of MSs.¹⁴

In addition to mutual trust between MSs, the trust that citizens place in states to protect their rights also needs to feature in the equation. Individuals submitting to the jurisdiction of a state do so in the expectation of a certain level of protection which respects the rule of law. States have an obligation to ensure that an individual within their jurisdiction is protected even when ejected from their jurisdiction.

The EAW

The European Arrest Warrant Framework Decision (EAWFD)¹⁵ is a unique instrument operating throughout the EU. It is the flagship MR measure, replacing extradition between MSs. In comparing the EAW to extradition there are similarities but also differences. Similarities lie in the end result; transfer of an individual by one state to another to stand trial or serve a sentence. Differences relate to the means employed to achieve this end and include the fast-track nature of the EAW and its near automatic enforcement. An EAW is issued by way of a judicial decision in one MS and is enforced, without nationalization or internalization, by the judicial authorities in another MS; the process is judicialised with no political involvement. On the basis of this

¹⁴ Subsequent chapters set out the protection of human rights in practice, showing the HRs violations of MSs.

¹⁵ Council of the EU, *Council Framework Decision 2002/584 on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, -002/584/JHA as amended by Council of the European Union, *Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial*, OJ 2009 L 81 of 2009-03-26, 24-36 (EAWFD)

decision an individual is arrested and sent (surrendered) within a short time period and with an exhaustive set of grounds upon which they can resist or challenge their surrender.

Dissecting elements of the EAW will reveal the holes left, in particular by the superficial handling of HRs relegating obligations to assumptions. Current analysis and commentary found in literature on the topic will be advanced through detailed consideration of relevant HRs including their scope and applicability to the EAW procedure. The partnership between the EU and the Council of Europe in protecting HRs will also be examined, as will attempts to date to reconcile and reinforce protection at the EU level.

HRs are important in the context of the EAW for all the reasons set out above. As the blueprint for MR measures, it needs to stand the tests of trust, sovereignty and reciprocity. Besides securing its own success, it is of equal and interrelated importance that EU citizens are also protected.

Can the EAW survive on the same basis envisioned by its framers and the original attitude towards HRs? HRs problems have already been broached in EAW cases, a detailed look at the applicable rights indicates that there are further issues which have yet to be addressed or raised by individuals before courts. It is thus no longer a question of should the EAW operate without appropriate respect for HRs but whether it can afford to ignore the importance of actively ensuring due respect for HRs.

Acknowledging the fact that action is needed, the EU has begun to take steps to fill potholes in HRs protection left by the EAW. An attempt to reposition HRs can be witnessed through recent Directives on defence rights and decisions of the CJEU, which have the aim of enabling the EAW to survive. However to what extent does EU law address these challenges?

The Importance of Human Rights

As noted it is widely accepted that for the system of MR in criminal matters to continue to function, protection of HRs needs to be fortified. The unsatisfactory situation concerning HRs is linked to the tension between HRs and MR and their different positioning of the individual. Focus of HRs is on the individual, under MR the focus shifts to the state.

The impact of the EAW on the life of an individual caught up in its web is profound; its implementation interferes with an individual's liberty, family and private life, EU Treaty rights and draws them into the criminal justice system which is daunting whether domestic or foreign. Judges are there to not only enforce the criminal law but to also act as guardians of rights – MR measures need to do the same, state mechanisms need to be accompanied by mechanisms which actively guard the individual. Existence of these active mechanisms, rather than passive assumptions, creates faith in the system as well as a back-up plan for when things go wrong. The individual requires an arsenal to protect them from the might of a fast-tracked cross-border mechanism. To counter the David and Goliath situation, there needs to be procedural guarantees in place to protect the individual, in particular when resisting surrender in the E-MS and before the I-MS. The individual needs to know what HRs should be respected; furthermore MSs also need to be aware of their obligations. What protection do these existing rights offer in practice, what are the thresholds that need to be met and to what standard of proof?

Safeguards and procedural guarantees need to be in place across the EU in order to accurately mirror the mutual trust imposed upon the judiciary by the principle of MR. If reality leads to a distorted mirror image, then practice will begin to reflect these uncertainties gradually undermining mutual trust and implementation of MR measures. What remains to be ascertained is how is it best to promote this improved HRs

protection, whether reliance solely on the ECHR mechanism is enough and what additional EU measures are necessary?

The purpose is therefore to assess the impact of the EAWFD on HRs, existing rights, what has been done to address the imbalance and what further is required.

Research Methodology

This research will identify both primary and secondary sources. The primary sources include legislation and cases¹⁶ and official documents of the EU. The secondary sources will include NGO reports, other documents and academic writings on European criminal justice as well as on relevant HRs principles. Selection of sources was guided by knowledge acquired and informal communications the author has encountered during the course of her professional life, including: officials of the EU; Judges; Lawyers; Legal experts and Academics.

These sources will be subjected to analytical procedures consisting of four steps. The first step includes the definition of key EU components which provide the framework for adoption of the key measure under consideration (the EAWFD). These include the AFSJ, the principle of MR and its application in criminal matters. As the blueprint MR measure, the EAWFD is the selected case study to test the viability of the principle of MR and the necessity for tangible HRs protection. The second step will involve dissecting the EAWFD and a close inspection of its provisions will be undertaken in order to piece together the EAW procedure. This is then cross-referenced with the implementing law of the United Kingdom (UK), once again dissecting the implementing law, the Extradition Act 2003(EA) and mapping out the procedure. The UK is restricted to the law as applicable to England and Wales and is selected as the central case study country based on the fact that it has become a key player in the EAW

¹⁶ As set out in the table of legislation and table of cases respectively.

system. Experience of other MSs will be referred to where relevant. Details of the EAW procedure will reveal gaps in HRs protection.

The third step is to identify relevant HRs applicable to the EAW procedure. HRs are defined by reference to the ECHR and CFR, with the case law of the ECtHR, CJEU and domestic courts (in particular those in the UK) as a further tool of interpretation. The ECHR has been selected as the reference HRs instrument since it is the most relevant to the domestic HRs protection of MSs as well as for its relevance to the EU, both as a basis of the CFR and also as part of its fundamental principles and values. In researching the case law, the facts are important in order to identify similarities and distinguishing characteristics as indicators of its relevance and applicability to the EAW procedure. Of equal importance is the principle set out in the case and how the court applies it to the particular set of facts; this is instructive as to its applicability to the EAW. As far as possible the ECHR cases referred to concern EU MSs. This will in turn support the assertion that membership of the ECHR is not a sufficient guarantee.

Once the specific HR has been defined, its application to the EAW is examined and the extended scope explored where relevant. Further justification of the necessity and applicability of a particular HR is provided by analysis of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) reports, statistics and reports of other international and regional organisations.

Having established the key HRs, in the fourth step the focus shifts to the action being taken by the EU to fill in the HRs protection gap and which rights are being addressed. Finally, the findings are drawn together to show that survival of MR in criminal matters is reliant on proper protection of HRs. Recommendations are made with the aim of promoting mutual trust thereby guaranteeing the future of MR measures in criminal matters.

The research will be consolidated into three parts. The first part introduces the key components to be assessed; the AFSJ; the principle of MR; and the EAW. Part II identifies the relevant HRs, setting out the minimum standards as set out by the ECHR, their extended EU scope and applicability to the EAW. Part III considers the EU attempts to improve HRs across the EU, including the relationship with the ECHR and MSs. Finally Part IV includes a summary of the key findings and recommendations for ensuring that HRs are protected in the implementation of the EAW, which instils genuine mutual trust, validating MR whilst ensuring that justice serves the accused, the victim and the EU.

Part One: Mutual Recognition and the European Arrest Warrant

Given the establishment of the principle of MR as the ‘cornerstone’ of EU development in the field of judicial cooperation in criminal matters, its suitability in the criminal sphere is considered followed by the continued role for harmonization. Once these foundations are laid, the EAWFD will be explored including its scope, implementation, benefits and limits. The next phase of its examination will be the positioning of HRs protection within the MR framework and specifically the EAW. The EAWFD as the blueprint for MR in European criminal law is a good illustration of the policy in practice. This analysis will identify gaps in the protection of the individual *vis a vis* the MSs and EU procedures. The balance is tipped in favour of expedience and state convenience to the detriment of the indispensable and vital HRs. The importance of HRs within this evolving framework has a critical role to play.

Chapter One: On the Principle of Mutual Recognition

According to Professor Mitsilegas, in the EU the relationship between the individual and the state is one based on “citizenship and territoriality”.¹⁷ However, in relation to HRs, this relationship is wider based also on jurisdiction and control. Within the EU criminal justice system there is also the introduction into this relationship of third parties (the EU and other MSs), and also of mutual trust which not only forms the central element of MR measures within the AFSJ but also demarcates boundaries of non-inquiry around MS systems. This triangular relationship between the EU, the MSs and citizens is an important element, as is the broader scope when HRs are engaged.

The boundaries are demarcated by almost impenetrable walls, within which the criminal justice systems of MSs are trusted virtually unreservedly. Judicial authorities of one MS

¹⁷ Valsamis Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law*, E.J.L.R., (2007) Vol. VIII, No. 2/3, 301-323, 316

are obliged to respect, almost unconditionally, decisions, views, integrity and respect for the rule of law in other MSs. Adoption of this “new transnational judicial mechanism signifies a deep transformation of the traditional territories of justice”.¹⁸

Whilst the EU is promoted as an area of dissolving borders, in contrast, the principle of MR, as the foundation of an AFSJ, “validates the sovereignty of the Nation State as a territory, people, and system of governance enclosed by borders ... [t]hese borders are boundaries of the legal orders for the purposes of criminal law”.¹⁹ So whilst the borders have been removed for the free movement of goods, services and workers, the criminal law of MSs remains ring-faced.

1.1 As an Alternative

In 1998 the EU had hit a T-junction in terms of which direction to steer criminal law. The decision was to appoint MR as the cornerstone of its policy thereby providing a detour from harmonization.

In an attempt to avoid handing over any further sovereignty to the EU, the idea was to shelve harmonisation plans, leaving the substantive criminal law of MSs untouched and instead to focus attention on MR as a preferred mode of governance.²⁰ This is reflected in the 1998 Presidency Conclusions of the Cardiff European Council where it recognizes the importance of “effective judicial cooperation in the fight against cross-border crime...[and]...the need to enhance the ability of national legal systems to work

¹⁸ Antoine Megie, *Replacing and Displacing the Law: The Europeanisation of Judicial Power*, CEPS Special Report, (2009) 3

¹⁹ Elspeth Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice*, ELJ, (2004) Vol.10 No.2, 218-234, 219

²⁰ Sievers considers mutual recognition as an alternative mode of governance to that of territoriality and harmonisation which whilst it worked well in the Single Market, requires additional support in the criminal sphere. For greater discussion on these see, Julia Sievers, *Managing Diversity: The European Arrest Warrant and the potential of mutual recognition as a mode of governance in EU Justice and Home Affairs*, EUSA Tenth Biennial International Conference in Montreal, Canada, 17-19.05.2007, available at: <aei.pitt.edu/8036/> accessed 18.05.2011

closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each others' courts."²¹

The acceptance of the idea to apply MR to the criminal law sphere marked the start of the blossoming relationship between MR and the development of judicial cooperation in criminal matters. Within a year the principle of MR was declared by the Tampere Council in 1999 as the "cornerstone of judicial cooperation" in criminal matters.

In 2000, the European Commission (the Commission) agreed that the then process of cooperation was slow and cumbersome and instead promoted MR which it defined as meaning,

that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure — in so far as it has extranational implications - would automatically be accepted in all other Member States, and have the same or at least similar effects there.²²

The 2000 Commission Communication paved the way to automatic acceptance of a judicial order issued in another MS requiring minimal harmonisation of standards and laws.

What the adoption of MR as the cornerstone for judicial cooperation in criminal matters did, was to act as the required stimulus and to give momentum to what was till then a slow process. It became "the motor of European integration in criminal matters"²³ and led to the adoption with unprecedented speed of the EAWFD and also a number of other MR measures. Another perceived advantage of MR was the ability to ignore differences that exist amongst MSs, leaving national systems largely unaffected and preserving the

²¹ EU: Council of Europe, *Cardiff European Council, Presidency Conclusions*, SN150/1/98 REV 1 EN, 15-16.06.1998, §39

²² Commission, *Communication from the Commission to the Council and the European Parliament Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, 26.07.2000, 2

²³ Valsamis Mitsilegas, *The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?*, Queen Mary School of Law Legal Studies Research Paper No. 33/2009; E.L.Rev, (2009) Vol. 34 No. 4, 537. See also Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, (2006) 43 CML.Rev 1277

much guarded sovereignty. Thus in addition to accelerating the cumbersome cooperation process it also dealt with the existing diversity without needing to engage with full harmonization. In the process of establishing an AFSJ, Guild sees “an inversion of an area without borders into an area that respects without question borders (i.e. mutual recognition)”.²⁴

Off-the shelf solutions rarely provide satisfactory resolutions and the principle of MR still requires further modification, approximation and reinforcement before it can be fully effective in criminal matters. The text of the Tampere Conclusions²⁵ illustrates that the intention from the start was that MR measures in the field of criminal law would be accompanied by trust-enhancing measures, requiring mechanisms for safeguarding rights and requesting definition of common minimum standards. The enjoyment of freedom also requires a genuine area of justice where victims can avail themselves to the Courts and authorities in any MS whilst at the same time ensuring that criminals do not exploit the differing judicial systems and their ability to freely cross borders. The Tampere European Council also anticipated the establishment of minimum standards to ensure an adequate level of legal aid, simplified extradition procedures, an integrated prevention of crime, common definitions and sanctions on limited sectors,²⁶ increased support for Europol and the establishment of Eurojust.

In advance of agreement on a programme for the 5 years after Tampere, the Commission made a set of recommendations in terms of priorities for the future of the AFSJ. As regards the promotion of a coherent criminal justice policy, the Commission²⁷

²⁴ Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice*, (n19)

²⁵ European Council, Council of the EU, *Presidency Conclusions of the Tampere European Council*, 1999. The Tampere Programme was the first stage in implementing the principle of Mutual Recognition to the expanding European Criminal law.

²⁶ The ones listed were financial crimes (money laundering, corruption), drugs trafficking, trafficking in human beings, sexual exploitation of children, high tech crime and environmental crime.

²⁷ Commission, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401 final, 2.06.2004

set out 4 priorities: keeping the principle of MR as the cornerstone of judicial cooperation; strengthening “mutual trust by assuring all European citizens of a high-quality of justice based on common values” by adopting a series of measures to cover “the definition of fundamental guarantees, the conditions for admissibility of evidence and measures to strengthen the protection of victims” in addition to training and evaluation of the systems; developing a coherent crime policy across the Union including approximation in some areas; and placing Eurojust at the centre of this policy.

The Commission further emphasised the need for strengthened monitoring and evaluation of practice in the national criminal justice systems with the aim of strengthening crime prevention action. This together with HRs and the highlighting of good practices can aid the promotion of mutual trust; the two are not necessarily mutually exclusive.²⁸

1.2 Origins

The principle of MR can be seen at play in different forums including the WTO.²⁹ At the EU level, the principle of MR itself stems from the internal market, emanating from two cases of the Court of Justice of the EU (CJEU), one concerning whiskey and the other *Cassis de Dijon*³⁰. In both these cases, the CJEU held that products imported from one MS should be accepted by other MSs as if they had been lawfully produced according to its own standards. MSs were therefore obliged to accept standards in the exporting state. It added that free movement of goods and MR of national standards did not require harmonization. This statement is mirrored in a decision of the same court

²⁸ For a synopsis of the AFSJ in the EU see Bedanna Bapuly, *The European Arrest Warrant under Constitutional Attack*, 3 Vienna Online J. on Int'l Const. L. 4 (2009), 8-11

²⁹ See, Joel P. Trachtman, *Embedding Mutual Recognition at the WTO*, (2006), available at: <<http://ssrn.com/abstract=923903>>

³⁰ C-120/78 *Rewe-Zentral AG* [1979] ECR 00649

almost 30 years later in the cases of *Gözütok and Brügge*,³¹ *Van Esbroeck*³² and *Advocaten voor de Wereld* which state that the EAWFD “does not seek to harmonise the criminal offences in question in respect of their constituent elements or the penalties which they attract”.³³

1.3 Misplaced Internal Market Analogy and Equivalence

The suitability of transplanting the principle of MR from the internal market into the sphere of criminal law has not been without criticism. The fundamental objection centres on the very nature of criminal law; it “regulates the relationship between the individual and the State, and guarantees not only State interests but also individual freedoms and rights”.³⁴

What has been seen in the field of European Criminal Justice is the incorporation of principles from the EU single market *acquis* unaltered. Simply because a principle functions in one area, does not guarantee that it will function equally well in a different sphere. The principle of MR has worked well in other fields³⁵ because of the existence of common markers of real benchmarks for minimum standards and the willingness of MSs to accept common standards agreed at the EU level as dictating the standards within their own systems. This reality has been summarised by Nicolaides and Schaffer,

In practice, mutual recognition, in all its incarnations, is conditional. Mutual recognition regimes set the conditions governing the recognition of the validity of foreign laws, regulations, standards, and certification procedures among states in order to assure host country regulatory officials and citizens that their application within their borders is “compatible” with their own, and that incoming products and services are safe.³⁶

³¹ Joined Cases C-187/01 & C-385/01 *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-01345 §33

³² C-436/04 *Van Esbroeck* [2006] ECR I-02333

³³ C-303/05 *Advocaten voor de Wereld VZW* [2007] I-03633 §52

³⁴ Mitsilegas *EU Criminal Law* (n3) 118

³⁵ Including the internal market, mutual recognition of qualifications, mutual recognition of driving licenses, etc...

³⁶ K.Nicolaides and G.Schaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, LCP, Vol. 68:263, 2005

Sievers summarizes the literature on this matter as listing four conditions which are required to be met before MR is able to properly function in the criminal law sphere. These are: (1) reciprocal trust and confidence; (2) accepting that the others' legal system is equivalent; (3) legal systems which are compatible with the laws; and (4) procedures of the other MSs and an institutional support structure to address issues which arise when the other three conditions are not met.³⁷ These elements not sufficiently present in the criminal justice field and there does not appear to be any conditions placed on MR in the EU criminal justice sphere. Assumptions are made as to the safety of decisions based solely on the fact that all MSs are signatories to the ECHR and as members of the EU have an allegiance to common values and principles.

The success of the MR principle in the internal market was due to the fact that equivalence between standards applied in MSs existed. As will be illustrated in subsequent chapters such equivalence is absent in both the criminal sphere and in the protection of HRs.

Other key differences between the application of MR in criminal law and in the internal market further illustrate the undesirable attempt to equate the two spheres. Amongst others, Peers believes that the analogies of the MR principle in the internal market and recognition of civil judgments with its functioning in criminal matters are 'deeply flawed'. He believes that "the Council has made the error of assuming that the underlying law need not be comparable".³⁸

MR seeks to avoid harmonization of criminal laws and for this reason the criminal law across the EU is not harmonised. Abolition of the dual criminality requirement in criminal matters has the entirely opposite effect of comparability. MSs are asked to not

³⁷ Sievers (n20) 8-9

³⁸ Steve Peers, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?*, CML Rev, (2004) Vol 41 5-36,14

compare their national laws governing the relevant offence with that of the I-MS, but instead to accept their assertion that the acts fall under the named offence for which dual criminality is abolished. The same applies to non-inquiry into the nature of the relevant offence.

1.4 Cooperation with a slice of Sovereignty

A key reason for opting for MR over harmonisation was the avoidance of surrendering any further sovereignty, however every time a MS enforces an EAW request it relinquishes a slice of sovereignty – even if only transiently.

The use of MR instead of the more invasive alternatives of harmonization and approximation has not meant that MSs retain full sovereignty over their criminal justice systems. Whilst cooperation principles do not traditionally require the decision of a State requesting assistance to form part of the requested State's legal system, the principle of MR does exactly that. It requires the executing State (E-MS) to internalise, unmodified, the issuing State's (I-MS) decision. In some instances it may require the recognition of a decision which goes against the grain of its own decisions.³⁹

Criminal law, by its nature evolves in relation to a State's culture and in accordance with the democratic processes. While those opposing approximation or harmonisation do so in the interests of maintaining sovereignty, MR in its own way, through the near automatic acceptance of other MSs' decisions, takes away a slice of sovereignty. With MR of a judgment or order issued nationally and not negotiated on an EU-wide platform by MSs, States are accepting the legitimacy of the national system which

³⁹ Arts 1(1) and (2) (Council, 2002/584/JHA)

issued them, thus representing a ‘journey into the unknown’⁴⁰ and complete confidence in the other’s system.

With criminal law striking to the heart of a MS’s sovereignty, the application of MR results in the loss of some of the MS’s “sovereign power over the full control of the enforcement of criminal decisions on its territory”.⁴¹ MR leads to a “horizontal transfer of sovereignty”.⁴²

Further evidence that “another little piece of their national sovereignty”⁴³ was transferred through the implementation of the EAWFD are the constitutional amendments that were required in some states.⁴⁴

1.5 Individual free movement

It is worth remembering that the object of previous EU legislation and policies was to promote the free movement of individuals, so as to further its economic ambitions. MR measures in the sphere of criminal law are the antithesis of this. It is true that free movement of individuals is facilitated, but not for their benefit.

⁴⁰ Mitsilegas, *EU Criminal Law* (n3) 119. See also, Mitsilegas, *The Constitutional Implications of Mutual Above Recognition in Criminal Matters in the EU* (n23) and Maduro Poiars, *So Close and Yet so Far: The paradoxes of Mutual Recognition*, *Journal of European Public Policy*, (2007) Vol 14, no 5, 814-25

⁴¹ Peers, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?* (n38) 10

⁴² Sievers (n20) 9, referring to Kalypso Nicolaides, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, (1997) Jean Monnet Paper, available at:

<<http://centers.law.nyu.edu/jeanmonnet/papers/97/97-07.html>> accessed 18.05.2011

⁴³ Joanna Apap and Sergio Carrera, *Judicial Cooperation in Criminal Matters, European Arrest Warrant, A good Testing Ground for Mutual Recognition in the Enlarged EU?* (2004) CEPS Policy Brief No. 46 available at: <www.ceps.be> 4

⁴⁴ Apap and Sergio cite the French Constitutional amendment as an example : Loi constitutionnelle no 2003-267 du 25 mars 2003 relative au mandat d'arrêt européen, NOR: JUSX0200149L, JO, du 26 mars 2003, 5344. Other, provisions of the EAWFD were clearly drafted to protect sovereignty. For example, the specialty rule is closely connected both to the principle of MR and to the sovereignty of MSs, in that consent is required from the E-MS before the surrendered individual can be prosecuted for offences other than those for which surrendered. The specialty rule is set out under Article 27. The CJEU interprets its application, in particular the interpretation of ‘offence other’ than that for which the person was surrendered which is to be ascertained according to the legal description given by the issuing Member State. Changes to time or place are acceptable where they are a result of evidence gathered during the proceedings. Modification of the description (such a as the narcotics) is not enough of itself to equate to ‘offence other’ than. Where it is found to be an ‘offence’ other than that for which surrendered, consent must be requested and obtained if the penalty is deprivation of liberty. The person can be prosecuted and sentenced before consent is obtained, but their liberty cannot be deprived unless the restrictions are lawful on the basis of other charges which appear in the EAW. Case C-388/08 *Criminal proceedings against Artur Leymann et Aleksei Pustovarov* [2008] ECR I-08993

The logic of MR in the internal market and European criminal law may be similar in terms of removing obstacles to free movement in a borderless Union. On the other side of the coin ensuring that lawbreakers do not benefit from the abolition of borders – the ‘fifth freedom’, the concept of free movement of an individual in MR in criminal matters is turned on its head. The original concept aims to facilitate the enjoyment of free movement within the EU to the advantage of an individual, enabling EU citizens to exercise Treaty rights across Europe. The notion of free movement in the context of European criminal law seeks to facilitate free movement of an individual for the benefit of MSs, with the counter effect of restricting the liberty and free movement of that individual.⁴⁵ It is important to remember that an individual is not a commodity for export, but a human being with HRs and with variables involved.

It is often the case that the rights of individuals in MR measures are secondary to the promotion of MR and the facilitation of cross-border cooperation between MSs with the aim of securing the surrender of the individual. Whilst the rights of victims are important, it cannot be ignored that the requested person can also become a victim of state ‘violence’. As will be shown in the next chapters, there is also a distinct lack of joined-up thinking across the European *acquis* and in particular between MR measures such as the EAWFD, the Citizens Directive,⁴⁶ the Charter of Fundamental Rights (CFR) and the ECHR, creating *lacunas* in the protection of the individuals in question and their dependents or family members.

⁴⁵ See amongst others, Mitsilegas, *EU Criminal Law* (n3) 118 and Peers, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?* (n38)

⁴⁶ EU, *Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, OJ L 158, 30.04.2004, 77–123 (Citizens Directive)

1.6 Approximation, Harmonization and Mutual Recognition

Despite the adoption of MR, there still exists a continued relevance and importance for both approximation and harmonisation within the MR framework.

In its judgments, the Court of Justice of the EU (CJEU) does not regard harmonisation as a prerequisite for the application of MR. It states that a,

...necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in other Member States even where the outcome would be different if its own national law were applied.⁴⁷

From the literature, there does not appear to be a common understanding and application of the terms harmonization and approximation, in fact these terms are often used interchangeably. Harmonization is often the creation of a single set of provisions or standards in criminal law for all MSs, whilst approximation will have less homogenous ambitions; attempting to increase understanding by highlighting and reinforcing similarities in systems rather than creating and artificially enforcing these similarities. “Approximation in the original spirit of the TEU is therefore an instrument to eliminate all the most relevant disparities”.⁴⁸ Approximation may also be accomplished through the adoption of common standards to be applied to their different national provisions by MSs. This characterization is in line with Article 67 TFEU. Article 82 TFEU is also relevant for approximation ambitions, in particular of HRs and forms the basis for the Defence Rights Directives being adopted and considered in Part 3.⁴⁹

⁴⁷ *Gözütok and Brügge* (n31)

⁴⁸ Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?* ELJ, (2009) Vol. 15 No. 1, 70-97, 76 citing FM Tadic, ‘How Harmonious can Harmonisation be? A Theoretical Approach towards Harmonisation of (Criminal Law)’, in Andre Klip and H van der Wilt (Eds) *Harmonisation and Harmonising Measures in Criminal Law*, Royal Netherlands Academy of Arts and Science (2002)

⁴⁹ See Annex 1.

Fichera regards that a “means/ends relationship exists between approximation and mutual recognition” with one promoting the other.⁵⁰ As noted above, the CJEU highlights the fact that MSs have opted for MR of decisions emanating from each others’ criminal justice systems. This MR is not necessarily based on an understanding of legal terms, let alone a deep comprehension of other legal systems. As it stands this MR is based on assumed mutual trust with misconceptions remaining unresolved.

Commentators argue that for MR to continue to function there needs to be some harmonization. Harmonization of substantive criminal law, such as the proposed vertical solution of the *corpus juris*,⁵¹ is unlikely to receive majority support from MSs. As Megie points out, convergence is preferred to harmonisation, as illustrated by the rejection of the *corpus juris* and the support for a European Prosecutor.⁵² MSs have accepted MR since it offers an easy option requiring minimal amendments to their own systems, increases their powers and is less costly than harmonization. On the other hand, in areas where MSs have common domestic policies they have been more amenable to reaching a consensus on harmonization.⁵³

In areas where agreement cannot be reached, approximation of some laws may be more acceptable for MSs. It is clear that whilst approximation is preferable in order to advance the high level of un-questioned cooperation, MSs are still largely hesitant to hand over any further sovereignty in particular in an area as sensitive as criminal law

⁵⁰ Fichera (n48) 77

⁵¹ In 1997, a group of legal experts presented this proposal for the development of a European Criminal Code. Whilst the proposal focused on budgetary fraud against the EC budget, enforced by a European public Prosecutor, the principle was intended for wider application. See John Spencer, *EU Fair Trial Rights : Progress at Last*, NJECL (2010) Vol. 1 Issue 04, 447-457

⁵² Megie (n18)

⁵³ An example of this would include the treatment of terrorism in Council of the EU, *Council Framework Decision 2002/475 on Combating Terrorism*, OJ L-164, 22.06.2002, 3–7 as amended by Council of the European Union, *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*, OJ L 330, 9.12.2008, 21–23

which strikes to the heart of their relationship with their subjects. MR “has been a convenient choice for MSs concerned about ceding sovereignty in criminal matters”.⁵⁴

Thus whilst even in the field of criminal law a number of mutual recognition Framework Decisions have been adopted, it can be concluded from the implementation reports of the European Commission that they have either not been implemented or only partly implemented by Member States. The reasons for the poor implementation levels, as well as the modest use that these measures are being put to in practice, would support the notion that MSs lack the appetite for further incursions into their criminal justice systems.

Weighing up the pros and cons of approximation, some commentators including Guild, clearly favour approximation. Whilst the process may take longer, requiring consensus across MSs and clearly involving interference with national systems, Guild feels that these are outweighed by the benefits inherent in approximation. Guild here is referring to the approximation of procedural guarantees seeing that “it has the advantage of building into the procedures the guarantees within Union law of compliance with fundamental rights.”⁵⁵ The positioning of the individual within the procedures is also emphasized as a benefit; with approximation the individual finds themselves at the centre of common rules whereas with MR the common standards are accessible only by the MSs. The EU Fundamental Rights Agency (FRA) in its review of the Stockholm Programme states that for a sufficient level of mutual trust to be sustainable “a strong common reading of fundamental rights protection” and the rule of law is needed and should include harmonization of procedural safeguards in criminal law.⁵⁶

⁵⁴ Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law* (n17) 314

⁵⁵ Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice* (n19) 227

⁵⁶ Fundamental Rights Agency, *The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda*, 14.07.2009

Another staunch supporter of approximation is Weyemberg, who maintains that approximation focuses on the contents of common norms as opposed to the effect alone. There is no doubt that as she states, approximation also offers “a stronger model of legal integration than coordination and cooperation. In principle, approximation implies adjustments of internal laws in order to meet specific objectives.”⁵⁷ Harmonization in this instance would dictate to MSs the letter of the law.

MR and approximation are however complimentary and not mutually exclusive. It is important that MR does not become an obstacle to the adoption of common standards which will see security continue to prevail over freedom and justice.

The adoption of MR does not however mean that the laws of MSs have remained unaltered. In fact in some MSs the effective implementation of the EAWFD required Constitutional amendments and new laws.⁵⁸ It is anticipated that in the near future more changes will be necessary, in particular in relation to harmonization of procedural guarantees.

⁵⁷ Anne Weyembergh, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, CML Rev, (2005) Vol.42, 1567-1597, 1567

⁵⁸ Amongst others, Polish and Cypriot Constitutions prohibited extradition of their own nationals, these were amended to permit surrender of their nationals under the EAWFD. In Germany Constitutional conflict led to adoption of a second implementing law. Consideration of these Constitutional conflicts is beyond the scope of this thesis, however a number of articles are written on the subject. For a summary of the Constitutional challenges and amendments see Zsuzanna Deen-Rasmany, *The EAW and Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, (2006)14 Eur.J.Crime Cr.L.Cr.J. 271; Isabelle Pérignon and Constance Daucé, *The European Arrest Warrant: a growing success story*, ERA Forum (2007) 8:203–214, 208-9. See also Daniel Saramieto, *European Union: The European Arrest Warrant and the quest for constitutional coherence*, I-CON, (2008) Vol.6: 171; Angelika Nußberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, I-CON, (2008) Volume 6, Number 1, 162–170; Bapuly (n28); Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law* (n17) 317-21; Elies van Sliedregt, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law*, European Constitutional Law Review, (2007) 3: 244-252; Fichera (n48) 81-4; Jan Komarek, *European Constitutionalism and the European arrest Warrant: In search of limits of “contrapunctual principles”*, CML Rev (2007) 44: 9-40.

1.6.1 The CJEU's View

Advocate-General Colomer, in *Advocaten voor de Werald*, states that since it is a new concept, the EAWFD “does not seek to approximate pre-existing national laws”.⁵⁹ On the other hand he stresses that the mechanisms used by this new concept already existed in MSs, namely the mechanisms to arrest and surrender which have been simply harmonised. The EAWFD does not create relationships between ‘hermetically sealed spaces’ but between states who share common principles, values and objectives seeking the prevention and combat of crime in a “single area of freedom, security and justice, by facilitating cooperation between States and harmonising their criminal laws”.⁶⁰ The operative part of the EAWFD harmonises the procedural law of MSs “by harmonising the form and content of the decision, the methods of and time-limits for transmission and execution, the grounds for non-execution, and the rights which protect the arrested person during the procedure and for the purposes of surrender”.⁶¹ So whilst the laws and procedures leading up to the decision to issue an EAW continue to be hermetically sealed; other aspects of the procedure, as set out above, are now uniform. What have been harmonized are the rules of cross-border engagement; thus the process of requesting and surrendering an individual has an autonomous meaning.

In the joined cases of *Gozutuk and Brugge*⁶², the CJEU considered the principle of *ne bis in idem* under Article 54 of CISA.⁶³ It confirmed that for a case to be 'finally disposed of' in accordance with Article 54, the decision did not need to be made by a judge, a decision of the Public Prosecutor sufficed where certain conditions to punish an act had been satisfied. The emphasis placed by the court is not on the judicial nature of

⁵⁹ *Advocaten voor de Werald* VZW (n33), Opinion of Advocate-General Colomer

⁶⁰ *ibid* §44

⁶¹ *ibid* §49

⁶² *Gözütok and Brügge* (n31)

⁶³ EU, *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders*, OJ L 239, 22.09.2000 P. 0019-0062 (CISA)

the decision, but on the “sanctioning character of the settlement/decision”. Thwaites is of the opinion that the judgment “is an indirect appeal for some harmonisation of MSs’ criminal justice systems”.⁶⁴ This assertion is questionable; the Court simply took the line that if MSs cannot agree to harmonise their criminal systems but still want to increase cooperation, they have no choice but to follow the principles of MR and mutual trust, which includes recognition of decisions which may have had a different conclusion under their own systems.

This line of reasoning follows the Court’s own statements on harmonisation in criminal matters and mutual trust. A necessary implication is “that the MSs have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in other MSs even where the outcome would be different if its own national law were applied”.⁶⁵ The Court highlights the fact that the operation of the principle is not dependant on approximation of procedures, but instead MSs have opted for mutual trust and recognition of each other’s criminal justice systems.

Borgers argues convincingly that the CJEU’s concern is not the “legislative history of provisions but focuses on the uniform and autonomous meaning of the relevant rules”.⁶⁶ In support he analyses not only the case of *Gözütok and Brügge*⁶⁷, but also *Pupino*⁶⁸ and *Kozłowski*⁶⁹. The focus on autonomous meanings is in the Court’s view necessary to guarantee uniform application of the rules across the EU and is what provides coherence to the European system.

⁶⁴ Nadine Thwaites, *Mutual Trust in Criminal Matters: the European Court of Justice gives a first interpretation of a provision of the Convention implementing the Schengen Agreement*, German Law Journal, (2003) Vol 4, No 3, 253-262, 261

⁶⁵ *Gözütok and Brügge* (n31) §33

⁶⁶ P. M Borgers, *Mutual recognition of the European Court of Justice*, Eur.J.Crime Cr.L.Criminology, (2010)

⁶⁷ *Gözütok and Brügge* (n31)

⁶⁸ C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285

⁶⁹ C-66/08 *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski* [2008] ECR I-06041

Any further approximation which will occur will take place in bite-sized pieces and be combined with MR. Harmonization of criminal law should remain at a minimum given its deep rooted integration in the democratic process of MSs. Rules of cross-border engagement should be harmonised whilst not interfering with the internal systems and remaining true to their individual heritages. Instead of standardizing substantial criminal law, it is preferable for common minimum standards to be adopted, such as procedural guarantees, which instill confidence in the procedures of each others' systems. The suggestion in subsequent chapters is that these common standards should have a basis in the ECHR but where appropriate adopt higher standards.

Chapter Two: On the European Arrest Warrant Framework

Decision

The EAWFD⁷⁰ is the flagship MR measure heralded as a success because of both the unanimous implementation⁷¹ and the frequency it is used by all MSs.⁷² For this reason it will also be used as the case study for testing the relationship between the principle of MR and HRs. Although it is the most debated of the MR measures, debates fall short of getting to the root of the issues, identifying these only at the branch level, (i.e.) HRs, legality, constitutional conflicts, etc. Whilst on paper it has been heralded as a success, its practical implementation has not been as celebrated, with the main concerns centering on issues of sovereignty, HRs and MS constitutional guarantees.

The terrorist attack in 2001 was taken as demonstrating the importance of the Tampere Conclusions and provided the necessary impetus to move what was until then a slow process. In response to these events an Extraordinary European Council⁷³ was held on 21st September 2001 where the fight against terrorism was prioritized;⁷⁴ the renewed list of priorities saw the EAW jump to position number one in the chart.⁷⁵ This link between the EAW and the ‘war on terrorism’ is an often used excuse to explain the HRs deficit

⁷⁰ For a detailed overview of the history relating to the EAWFD see Nico Keijzer, ‘Origination of the EAW Framework Decision’ in Elspeth Guild and Luisa Martin (Ed.), *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Wolf Legal Publishers, 2009

⁷¹ Here unanimous implementation refers to the fact that it has been implemented by all MSs and not to the level of satisfaction with which it has been implemented by MSs.

⁷² The Commission considers it a success. See also Pérignon and Daucé (n58)

⁷³ European Council, *Conclusions and Plan of Action*, (2001) SN 140/01

⁷⁴ Within a year three important Framework Decisions were adopted. Council of the EU, *Council Framework Decision 2002/475 on Combating Terrorism*, 13.06.2002; *Council Framework Decision setting up Eurojust with a view to reinforcing the fight against serious crime*, 28.02.2002 and the EAWFD (n15).

⁷⁵ In the Council of Ministers (JHA), *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, adopted 30.11.2000, 2001/C 12/02, the EAW was priority 2 rated with priority 1 been allocated to evidence and asset freezing. See Fichera (n48) 71-2 who also highlights the fact that the offences referred to had till that point being limited to ‘serious offences’.

in the EAWFD. However this link is neither a justification nor helpful in furthering either MR or HRs and is not reflected in the final text of the EAWFD.⁷⁶

2.1 Scope

The EAW is defined in Article 1 as a “judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”; MSs shall execute an EAW on the basis of the principle of MR.

These judicial decisions are not negotiated and adopted at the EU level, but are decisions taken at the national level.⁷⁷ Fichera sees this ‘parallel simplification of procedures’ together with the abolition of traditional extradition grounds of refusal as a reflection of MSs’ increasing confidence in each other’s legal systems.⁷⁸ The question ignored by the adoption of MR is whether the high level of confidence called for exists, or if it is work in progress.

2.2 Changing terminology

It is worth noting the move away from traditional extradition terminology in favour of words such as surrender (to indicate the act of extraditing a person to an EU MS). The MSs concerned are known as the issuing state (the MS requesting the surrender of the individual) and the executing state (the MS surrendering the individual).

Plachta considers at great length the birth of the term ‘surrender’ and whether it is in fact a misnomer when it comes to the EAW.⁷⁹ He traces its origin to the statutes of the

⁷⁶ For an overview focusing more on the politics of the adoption of the EAW see Christian Kaunert, ‘Without the Power of Purse or Sword’: *The European Arrest Warrant and the Role of the Commission*, J.Europ.Integration (2007) 29(4): 387-404

⁷⁷ Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law* (n17) 314

⁷⁸ Fichera (n48) 78

⁷⁹ Plachta, *European Arrest Warrant: Revolution in Extradition?*, Eur.J.Crime Cr.L.Cr.J. (2003), Volume 11 Issue 2, 178-194

ICTY, ICTR and the ICC⁸⁰ highlighting a key difference with the EAW, namely that they concerned a horizontal model of surrender between a state and an international tribunal, whereas extradition is a vertical model of extradition between states.

2.3 Benefits: Deleting the Muddle

Before critically evaluating this measure, it is worth taking a moment to reflect on the EAWFD's positive aspects.⁸¹

There is no doubt that the system introduced by the EAWFD is a vast improvement on the previously slow and complex system of extradition.⁸² Whilst the Council of Europe Convention on Extradition⁸³ attempted to simplify the process, its poor rate of ratification together with the additional bi-lateral treaties entered into by MSs meant that the extradition process was a complex matrix of different rules, forms, time-frames and authorities. The whole system had turned into a muddle of different rules.⁸⁴

The EU had also set off on its own mission to speed up and simplify the process through adoption of a number of measures, some of which never came into force and which were once again layered upon by bilateral agreements between MSs. These measures merely added to the complexity of the process.

⁸⁰ Statute of the International Tribunal for the Former Yugoslavia, UN Doc. S/2-5704 (1993); Statute of the International Tribunal for Rwanda UN Doc. S/INF/50 (1994); and Rome Statute of the International Criminal Court, 17.07.1998, UN Doc. A/Conf. 183/9.

⁸¹ Amongst others, a tour of the key benefits can be found in Plachta (n79) where the abolition of double criminality, the grounds for refusal, the judicialisation, simplification and speeding up of the process, the rule of specialty, trials in absentia and the treatment of life sentences are considered. See also Nico Keijzer and Elies van Sliedregt (Eds), *The European Arrest Warrant in Practice*, 2009

⁸² The EAWFD replaces previous agreements concerning the extradition of individuals between EU Member States. Articles 31 and 32 set out the exception permitting bilateral and multilateral agreements as long as they further the objectives of the EAWFD, in particular to simplify or facilitate further the procedures for surrender of persons who are the subject of EAWs. Their application have been considered by the CJEU in C-296/08 *PPU Extradition proceedings against Ignacio Pedro Santesteban Goicoechea* [2008] ECR I-06307

⁸³ Council of Europe, European Convention on Extradition, Paris, 13.XII.1957

⁸⁴ For an overview of extradition agreements leading up to the EAWFD see Bapuly (n28). There is also an overview of the thwarted attempts to improve efficiency in Plachta (n79)

Having outlined the thwarted attempts to improve the efficiency of extradition, Plachta believes that it was only once the evolutionary approach was abandoned and replaced by a revolutionary step that progress was made.⁸⁵

The EAWFD provides for a single central authority in each MS, a common request form, a set time-frame, reduced formalities, abolition of double criminality for 32 offences and turned the presumption in favour of surrender with only exceptional circumstances where it can be refused. This includes exhaustive grounds for refusal and also the obligation to surrender one's own nationals. Deen-Racsmay points out, it is not the 'formal-semantic innovations' set out above that justify the departure from traditional grounds, but the concept of EU citizenship.⁸⁶ In particular it is this concept of European citizenship that sees the exclusion of the fiercely guarded exception for a state's own nationals.⁸⁷

Perhaps more importantly it moved the entire process from the political realm of MSs and placed the procedure into the sole hands of the judicial authorities, as Bapuly and Plachta call it, the 'judicialisation' of the process.⁸⁸ The "dialogue is no longer between sovereign states, but between independent judges".⁸⁹

Pérignon and Dauce⁹⁰ talk of the changes in terms of the efficiency the simplified process has effected, including the uniform format and strictly limiting the grounds for refusal to those enumerated.

The EAWFD was adopted in the aftermath of the terrorist attacks in the USA. The priorities at the time were clearly security, even if this was to be to the detriment of

⁸⁵ Plachta (n79)

⁸⁶ Deen-Racsmay (n58) 274. Also citing F Impala, *The European arrest Warrant in the Italian Legal System: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, 1 ULR (2005)

⁸⁷ Plachta (n79) 187

⁸⁸ Bapuly (n28)14; Plachta (n79) 187-8

⁸⁹ Fichera (n48) 78

⁹⁰ Pérignon and Dauce (n58)209-10

liberty. Before detailing the position of HRs in the new mechanism it is worth noting the words of the President of the USA, President Obama, who in his first inaugural speech joined the voices that rightly “reject as false the choice between our safety and our ideals”.⁹¹ Liberty and security are not mutually exclusive; on the contrary, they are complimentary.

The mechanism of the EAW “is based on a high level of confidence between Member States”.⁹² The effective functioning of MR relies heavily on mutual trust. This mutual trust is exemplified in the EAWFD through the limited grounds for refusing to fulfill a request, reduction to a minimum of procedural formalities and abolition of dual criminality.

2.4 Is it Different to Extradition?

Whilst it is beyond the scope of this work to consider in detail the precise differences between traditional extradition and the EAW, the differences relevant to the consideration of the EAW vis a vis human rights are set out here in brief. The goal of both extradition and the EAW remains the same, namely to surrender an individual to another state for prosecution or to serve a sentence.

A key difference however is that in extradition the relationship between two states involves one state making a request and the other decides whether to satisfy the request. In the case of the EAW, a state makes a request, however, for the reasons considered below, the decision whether to fulfill it has to a large extent been taken out of the E-MS’s hands. This may be explained by the changing landscape which Pollivino describes as “an institutional scenario where judicial assistance is requested and granted within an integrated transnational judicial system”.⁹³ Sanger describes the EAW as

⁹¹ President Barak Obama, *President Barack Obama's Inaugural Address*, January 21, 2009

⁹² EAWFD (n15) Recitals 6 and 10

⁹³ Pollivino (n6) 1321

“new, more advanced creature that provides a legal basis for individuals to be subject to foreign substantive and procedural criminal law rules”.⁹⁴

As will be seen, the European Court of Human Rights (ECtHR) regards the EAW as being equivalent to extradition. Despite the changes, Plachta also does not regard the change of name to be a reflection of a change of substance or creation of a new system of international cooperation and in fact takes offence to what he regards as a the flippant use of the term ‘surrender’ by the EU. He reminds readers that extradition and by extension the mechanisms and safeguards that have developed, only make sense when considered in terms of relationships between states and their vertical model.⁹⁵ In addition the main impediments to traditional extradition are still present in the EAW process including sovereignty, reciprocity and the need to protect individuals from ill-treatment abroad. There is no disagreement that these continue to be considerations; however the later does not act as an impediment to the extent Plachta envisages.

It is questionable whether the MSs themselves are convinced that the EAW is an all new system. The UK implementation does not see the creation of a new mechanism, but rather addresses the necessary amendments in the context of its extradition procedure. The implementing law in the UK is the EA which contains different procedures depending on which ‘Category’ a country falls under. EU MSs fall under Category 1 and are subject to the EAWFD rules. Part 1 of the Act deals with EAWs received by the UK and Part 3 regulates EAWs issued by the UK to other MSs.

This aside, it is clear that the EU considers the EAWFD as more than a re-branding exercise. In *Advocaten voor de Werald*, Advocate-General Colmar is clear that the EAW is not extradition, “[i]t is clear that both concepts serve the same purpose of

⁹⁴ Andrew Sanger, *Force of Circumstance: The European Arrest Warrant and Human Rights, Democracy and Security*, (2010) 6:1, 17-51, 43

⁹⁵ Plachta (n79) 191-4

surrendering an individual who has been accused or convicted of an offence to the authorities of another State so that he may be prosecuted or serve his sentence there. However, that is where the similarities end”.⁹⁶

2.4.1 Dual Criminality

Its scope set out in Article 2, including, the abolition of dual criminality for the 32 listed offences, is a prime example of MR in the EAWFD, surrender for these offences will be “without verification of the double criminality of the act”.⁹⁷

What will be noted at first glance is that the list contains a varied spectrum of crimes. Whilst some, such as murder, are easily defined and comparable across the MSs, the definition and classification of others such as swindling and rape⁹⁸ differ across the MSs. Peers points out that since the assertion by the requesting state that the alleged offence falls within the list is non-rebuttable, “this could be considered an “automatic” application of the mutual recognition principle”.⁹⁹

According to the Extraordinary European Council, the EAW would ‘supplant’ the extradition systems which do not ‘reflect the level of integration and confidence between’ MSs. The EAW “will allow wanted persons to be handed over directly from one judicial authority to another. In parallel, fundamental rights and freedoms will be guaranteed.”¹⁰⁰

The preceding Conclusions of the Justice and Home Affairs Council¹⁰¹ which also highlighted the priority to be given to the fight against terrorism, formulating the reasons for developing new measures, in particular the EAWFD, with reference to

⁹⁶ *Advocaten voor de Wereld VZW* (n33), Opinion of Advocate-General Colomer §41. See also Fichera (n48) 84-87; Komarek (n58)

⁹⁷ *ibid.* For other offences double criminality ‘may’ still be required, Art 2(4). See Fichera (n48) 79-81 for a discussion of the abolition and reliance on mutual trust.

⁹⁸ See *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin)

⁹⁹ Peers, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong* (n38) 14

¹⁰⁰ European Council, *Conclusions and Plan of Action* (n73)

¹⁰¹ *ibid*

terrorists, including “the need to overcome the requirement of double criminality in terrorist cases”. It is important to note the reasoning provided for the need to fast-track extradition, in particular its purpose to permit MSs to deal with threats from terrorism and organized crime. The 32 offences are not restricted to the most grave offences related to either terrorism or organised crime, and neither has the practice of certain MSs when engaging the EAW been limited to these high level crimes.¹⁰² Before 11th September 2001, the offences referred to in relation to the then proposed EAW were limited to ‘serious offences’, what is adopted after 9/11 is a much longer and broader list, containing offences for which no approximation measures have been adopted¹⁰³ and those for which no common definition exists at the European level.¹⁰⁴ This broader list does not have an intrinsic cross-border element; the only cross-border element in most cases is the location of the person rather than the crime. The fast track nature of the procedure means it is crucial that measures are in place to ensure HRs are protected as part of the procedure and not simply left to chance that the general protection will be engaged.

Keijzer considers the list of the 32 offences as vague¹⁰⁵ and arbitrary and is critical of the abolition of dual criminality.¹⁰⁶ The abolition of dual criminality alone is not enough, during the legislative process MSs had genuine and reasonable concerns relating to this list of offences. Ireland was concerned due to the lack of definitions for the offences, whilst Italy’s concerns were the need to restrict the list to serious crimes. For different reasons MSs were coerced to agree to the final text of the EAW.¹⁰⁷

¹⁰² In relation to the UK, Poland provides a particular problem in terms of the volume of requests for ‘minor’ offences.

¹⁰³ Such as drug trafficking, money laundering, human trafficking, fraud against the European Communities, etc...

¹⁰⁴ Fichera (n48) 72

¹⁰⁵ See also Pérignon and Daucé (n58) 207 who talk of the vagueness of the list and the concerns it raises in Member States.

¹⁰⁶ Keijzer, *Origination of the EAW Framework Decision* (n70)

¹⁰⁷ Sanger (n94) 35

Some form of low level approximation of these offences is needed, such as the creation of a matrix for each offence illustrating the different elements required by each MS. Such a simple matrix would not need to be legally binding, but rather act as a tool to assist with linguistic difficulties and avoid tensions identified by Bapuly,¹⁰⁸ whilst also highlighting the similarities between MS thereby promoting understanding and mutual trust.

The CJEU, in the *Advocaten voor de Wereld*¹⁰⁹ case, was asked to consider whether the removal of dual criminality for the 32 listed offences was contrary to the principle of legality. In a circular statement relying on mutual trust, the Court dismissed the arguments that it was contrary by simply asserting that in the same way as respect for HRs is assumed to exist throughout the MSs, so it is assumed that the principle of legality is also respected, therefore meaning that the removal of the dual criminality for the 32 listed offences was not contrary to the principle of legality. In support, it is reiterated that the EU is “founded on values common to Europeans, such as liberty, democracy, the rule of law, and respect for human rights and fundamental freedoms”.¹¹⁰ From this flows the assumption that in the EAWFD MSs have jurisdiction to prosecute the 32 listed offences. On the basis of this assumption there is no need to apply the test of dual criminality, the principle is not really abolished but rather a presumption is established to satisfy the existence of dual criminality for the 32 offences.¹¹¹ The EAWFD does not seek to harmonise either the criminal offences (constituent elements or penalties), their definition and penalties continue to be determined by the issuing Member State’s law which “must respect fundamental rights and fundamental legal

¹⁰⁸ Bapuly (n28) 12-13

¹⁰⁹ *Advocaten voor de Wereld* (n33)

¹¹⁰ *ibid*, Advocate-General Opinion §9

¹¹¹ *ibid*, Advocate-General Opinion §§45-46

principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties”.¹¹²

This is how the circular argument is closed. The EAWFD abolishes dual criminality on the basis that the EU was founded on the common values of MSs, including the principle of legality. This creates the presumption that dual criminality exists and additionally the EAWFD says that MSs should respect HRs and principles.

2.4.2 Limited Grounds of Refusal

The EAWFD provides for an exhaustive list of grounds upon which a MS can refuse to surrender a requested person. The reduced formalities, together with the exhaustive and limited list of grounds for refusal to surrender a requested person are the most obvious illustrations of MR. Under the EAWFD there are 3 mandatory grounds for non-execution¹¹³ and a further 7 optional grounds¹¹⁴. It is interesting to note that these grounds have not been consistently implemented by MSs.¹¹⁵

Van Sliedregt, does not regard the exhaustive list as a drastic reduction in the grounds and believes that they leave room for ‘distrust’.¹¹⁶

It is however the implementation of the optional grounds which creates disparity in practice.¹¹⁷ Many of the seven optional grounds for refusal have been implemented by

¹¹² *ibid* §53

¹¹³ Art.3, EAWFD (n15)

¹¹⁴ *ibid*, Art.4

¹¹⁵ Commission, *Report on the Implementation of the Framework Decision on the European Arrest Warrant under each Member State's Law*, (COM(05) 63); and Add 1: Commission Staff Working Document - Annex (SEC(05) 267); Commission, *Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version)*, COM/2006/0008 final; and Commission, *Report to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2011) 175 final

¹¹⁶ van Sliedregt, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law* (n 58) 249

¹¹⁷ For implementation of the EAWFD and the grounds see: Commission, *Report from the Commission of 23 February 2005 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2005) 63 final; Commission Staff Working Document, *Annex to the Report From The Commission based on Article 34 of*

some MSs as mandatory grounds and are considered by others as discretionary rather than optional.¹¹⁸

The EAWFD was amended to include an additional optional ground. Previously, Article 5(1) addressed the issue of trials in absentia¹¹⁹, this has been deleted and the EAWFD amended inserting Article 4a.¹²⁰ This sets out the grounds for non-recognition of decisions rendered following a trial in absentia and the conditions for its application. In *IB* the CJEU interpreted conditions which can be placed on surrender in these circumstances.¹²¹ In *Melloni*,¹²² the CJEU considered the strict application of Article 4a. This is discussed further in relation to the right to a fair trial.

the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM(2005) 63 final; *Report From The Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2007) 407 final; *Report from the Commission of 24 January 2006 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version)* COM(2006) 8 final; *Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2011) 175 final

¹¹⁸ Some commentators argue that the optional grounds are in fact discretionary grounds. In the recent case of Case C-306/09 *I.B.* [2010] I-10341, the CJEU has described them as optional at paragraph 39 (in French “des motifs facultatifs prévus”). These grounds for refusal are referred to in subsequent chapters as they relate to human rights. For a detailed consideration of these grounds and their implementation see: J Komárek, *European Constitutionalism And The European Arrest Warrant : In Search Of The Limits Of “ Contrapunctual Principles ”* (2007) 44 *Common Market Law Review*; J Wouters and N Frederik, *Of Arrest Warrants , Terrorist Offences and Extradition Deals . An Appraisal of the EU ’ s Main Criminal Law Measures against Terrorism after ‘ 11 September ’* [2004] *Institute for International Law Working Paper* 56; S Peers, *Mutual Recognition And Criminal Law In The European Union : Has The Council Got It Wrong?* (2004) 41 *Common Market Law Review*; L Marin, “*A Spectre is Haunting Europe*”: *European Citizenship in the Area of Freedom , Security and Justice*’ (2010); M Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?* (2009) 15 *European Law Journal*, 70.

¹¹⁹ The treatment of trials in absentia are further considered in the chapter on the right to a fair trial.

¹²⁰ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Trials in Absentia FD)

¹²¹ The CJEU stated that Article 4(6) and 5(3) EAWFD ‘must be interpreted as meaning that, where the executing Member State has implemented Article 5(1) and Article 5(3)’ EAWFD into its domestic legal system, the execution of an EAW issued for execution of a sentence imposed in absentia, “*may be subject to the condition that the person concerned, who is a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State.*” C-306/09, *IB* (n118) §61

¹²² C-399/11, *Stefano Melloni* [2013] ECR 00000

It is particularly telling to see what grounds are missing and there are notable omissions which could create distrust, such as the political offence exception and the prohibition against surrendering own nationals. Wouters and Naerts see the logic in precluding 'political offences' stating that if "the regime of a Member State were worthy of rebellion, one should rather have recourse to the mechanism of Article 7 TEU, which would justify suspension of the ... [EAWFD, adding that]...in cases of persecution, surrender should, and under most implementing laws will, be refused".¹²³ This logic is questionable and largely reliant on the political sympathies of the requested MS or the EU as a whole. It also fails to take into account the supremacy of mutual trust. What the exclusion does is add another notch to the MR scoreboard in the sense that it reflects the mutual trust that supposedly exists between MSs.

Whilst some agree that important grounds for refusal are either missing or much needed, others fear that additional grounds, such as proportionality for example, could steer the EAW system back towards traditional extradition.

Grounds are both limited and exhaustive and in practice the surrender appears to be almost automatic. However, those MSs that go beyond the exacting letter of the law are scorned for undermining the principle of Mutual Recognition and raising issues of reciprocity, where if one MS adopts an unmitigated stance that it will not for example surrender its own nationals, other MSs will adopt a similar stance towards it.¹²⁴

Nevertheless, the introduction of these grounds for refusals has altered MR. MR in criminal matters is arguably a form of accelerated, almost unconditional cooperation, rather than MR in its original (automatic) sense.

¹²³ Jan Wouters and F Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September"*, CML Rev, (2004) Vol.41 909-935, 922

¹²⁴ See Fichera (n48) 87-88 for a brief overview of reciprocity issues which have already risen in Germany, Spain, Poland and Greece.

The CJEU has had the opportunity to interpret some of these grounds. The emphasis of its case law is that many of the terms contained in the EAWFD are autonomous concepts within Union law. For example the meaning of ‘same acts’ under Article 3(2) “must be given an autonomous and uniform interpretation throughout”¹²⁵ the EU and not by reference to MS interpretation/laws.¹²⁶

The terms ‘staying in, or is a national or a resident of, the executing Member State’ under Article 4(6), are also to be defined uniformly since they are autonomous concepts in EU law. MSs are not entitled to give a broader interpretation, beyond the EU definition.¹²⁷

High importance is also placed by the CJEU to the principle of MR. In interpreting the implementation of Article 4(6) it states that it is an optional ground for refusal, and so where a MS elect to limit situations where surrender is refused, it “merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice.”¹²⁸ Such limitations further facilitate surrender “in accordance with the principle of MR set out in Article 1(2) of Framework Decision 2002/584, which constitutes the essential rule introduced by that decision”.¹²⁹ To this end MS have a “certain margin of discretion” and the objective of ensuring reintegration into society provides a legitimate aim for a MS to limit situations for refusal in a manner which is consistent to the essential principle – MR.

The object of Article 4(6) is to enable weight to be given “to the possibility of increasing the requested person’s chances of reintegrating into society when the

¹²⁵ Case C-261/09, *Gaetano Mantello* [2010] ECR I-11477, §38

¹²⁶ Although, whether a person has been ‘finally judged’ is to be determined with reference to the MS national law under which the judgment was delivered

¹²⁷ *Kozłowski* (n69) §46-48 which will include an overall assessment considering factors such as, “the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.”

¹²⁸ Case C-123/08, *Dominic Wolzenburg* [2009] ECR I-09621§58

¹²⁹ *ibid.*, §59

sentence imposed on him expires.”¹³⁰ This objective can only be pursued where it has been demonstrated that the requested person has “a certain degree of integration in the society of that Member State”. For this reason the condition of residence of a continuous period of five years for nationals of other MSs imposed by the Dutch law was held to be proportionate to the legitimate objective pursued by the national law and compatible with Article 12 EC. Whereas in *Lopes Da Silva Jorge*, it was held that to automatically restrict the operation of Article 4(6) to only French nationals was in breach of the non-discrimination principle in Article 18 TFEU.¹³¹ So whilst MSs are given a certain margin of appreciation when implementing Article 4(6), limits have been set.

Related to this line of thinking is the abolition of the ground to not surrender one’s own nationals. This was subject to litigation in a number of Member States leading to amendments of both national law and Constitutions.¹³²

2.5 Implementation by the UK

The UK will be used to illustrate how the theory is acted out in practice.¹³³ As stated above, the EAWFD was implemented by the EA. Section 64 EA, which transposes Article 2 EAWFD, does not require the courts to consider whether the alleged conduct would constitute an offence under the law of the requesting state.¹³⁴ Nor does it require that an EAW be accompanied by a separate document certifying it.¹³⁵ Section 64(3)(b) imposes a double criminality requirement in respect of offences which are not listed in the EAWFD.

¹³⁰ *ibid*, §67

¹³¹ Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge* [2008] ECR 0000

¹³² For further information about these challenges and amendments see footnote n.58

¹³³ See the judgment of Lord Bingham in *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67 §§2-11 for description of old and new system.

¹³⁴ *Boudhiba v National Court of Justice, Madrid* [2006] EWHC 167 (Admin).

¹³⁵ *Dabas v High Court of Justice, Madrid* [2007] UKHL 6.

With reference to the guarantees in relation to trials in absentia under Article 5(1)

EAWFD, the UK has introduced additional conditions, not envisaged in the EAWFD.

Section 20(8) EA provides that if a person has been convicted in absentia, they must be entitled not only to a re-trial but also be guaranteed,

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

These guarantees have been considered by the House of Lords in *Caldarelli*¹³⁶ where the relevant provisions are summarised,

14. Section 20 [...] if the judge decides that the person had not been tried in his presence, and had not deliberately absented himself and would not be entitled to a retrial or (on appeal) a review amounting to a retrial, he must order the person's discharge.

15. Section 21 requires the judge to consider whether the person's extradition would be compatible with his Convention rights under the Human Rights Act 1998. The section is engaged if the person is accused of the commission of an extradition offence but is not alleged to be unlawfully at large after conviction of it, if the person was convicted in his presence, if the person had deliberately absented himself from his trial or if the person, not having absented himself deliberately from his trial, would be entitled to a retrial or (on appeal) to a review amounting to a retrial.

Section 11 lists the bars to surrender, whilst some are a direct transposition of the EAWFD (double jeopardy and person's age) others have been added by the UK law (extraneous considerations and passage of time). According to the fourth round evaluation report of the European Council, the UK provisions concerning the rule of speciality under section 17 are not compatible with the EAWFD.¹³⁷

¹³⁶ *Caldarelli (Appellant) v Court Of Naples (Respondents)* [2008] UKHL 51 House of Lords, 30.07.2008

¹³⁷ "Twelve Member States (BE, CY15, DK, DE, EL, ES, FI, IT, MT, NL, SE, UK) have not made amendments to their respective legislations, although they were recommended to do so in previous Council and Commission reports. This is even more regrettable in the case of Member States that were expressly mentioned in the 2007 Report of the Commission as requiring an effort to comply fully with the

Section 13 transposes Recital 12 and provides that a “person’s extradition...is barred by reason of extraneous considerations if” it appears that the warrant “is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions”, or that if extradited, the person “might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions.”

Section 14 EA provides that surrender is barred by reason of the passage of time if it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have become unlawfully at large.¹³⁸ This section goes beyond the requirements of the EAWFD and is one ground for refusal which the Courts have accepted to refuse surrender.¹³⁹ The distinction between injustice and the oppression of extradition is significant. Generally, issues such as the fairness of trial in the I-MS will be relevant to whether extradition is unjust by reason of the passage of time.¹⁴⁰ But where the argument is that the extradition would disrupt the appellant’s family life (which has developed in the time since the individual is alleged to be

Council Framework Decision (CY, DK, IT, MT, NL, UK).” Commission, Report from the Commission to the European Parliament and The Council, On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, p.5. See also references to the UK in Commission, Staff Working Document Annex to the Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States {COM(2005) 63 final}, SEC(2005) 267.

¹³⁸ *Campbell v Her Majesty’s Advocate* [2008] Scot HCJAC

¹³⁹ Four EAW requests were refused in 2005, according to the House of Lords, EU Committee, 30th Report of Session 2005–06, *European Arrest Warrant: Recent Developments, Report with Evidence*, 4 April 2006, citing the Letter of 22 February 2006 from Mr Andy Burnham MP, Parliamentary Under Secretary of State, Home Office, printed with the Report. See *Jaworski v Regional Court Katowice, Poland* [2009] EWHC 858; *Louca v the Office of the Public Prosecutor in Bielefeld, Germany and others*, [2008] EWHC 2907 Admin; *Oraczko v District Court of Krakow* [2008] EWHC 904 Admin; *Lisowski v Regional Court of Bialystok* [2006] EWHC 3227 Admin.

¹⁴⁰ *Campbell* (n138); *Dziedzic v Germany* [2006] EWHC 1750 (Admin); *Harvey v Tribunal Judicial de Albufeira, Portugal* [2007] EWHC 3282; *Edward Jaworski V Regional Court Katowice, Poland* [2008] EWHC 858 (Admin)

unlawfully at large), the issue is whether extradition would be *oppressive* by reason of the passage of time.¹⁴¹

Spencer regards the UK implementation as unnecessarily complex, wordy and disconnected from the EAWFD text.¹⁴² He cites Lord Hope to illustrate that the drafting of EA has caused many of the problems which have arisen in case before both the courts including the Supreme Court. In *Pilecki* Lord Hope states,

Once again, as in *Office of the King's Prosecutor, Brussels v Cando Arms* and *Dabas v High Court of Justice in Madrid, Spain*, it has to be said that the fact that the language of Part 1 of the 2003 Act does not match the requirements of the Framework Decision has given rise to difficulty.¹⁴³

Section 21 provides for a review of whether the surrender is compatible with the ECHR within the meaning of the Human Rights Act 1998, thereby providing an additional ground upon which surrender may be refused. Spencer regards this as a good thing however he is not as fond of the “smug sense of cultural superiority” which lurks behind.¹⁴⁴

2.6 Responsibility to Act Proportionately

MSs have a responsibility to ensure that the EAW continues to function efficiently. This responsibility includes to use the EAW proportionately¹⁴⁵ and thus avoiding clogging up the system with offences which are not either terrorist, serious organised crime or cross-border crimes or even ‘serious crimes’. MSs should also not view the EAW as an alternative to the more cumbersome mutual legal assistance measures.

¹⁴¹ *Boguslaw Oraczko v District Court in Krakow* [2008] EWHC 904 (Admin). In either case, whether the individual has knowingly caused the delay himself is a decisive issue in courts’ deliberation.

¹⁴² John Spencer, *Implementing the European Arrest Warrant: A Tale of How Not to Do it*, Stat.L.R., (2009) 30(3) 184-2002. For a more forgiving review of the UK implementation of the EAWFD see also Nicola Padfield, *The European Arrest Warrant: Between Trust and Democracy and the Rule of Law – Implementation of the European Arrest Warrant in England and Wales*, EuConst, (2007) 3:253-268

¹⁴³ *Pilecki v Circuit Court of Legnica, Poland* [2008] UKHL 7, §22

¹⁴⁴ John Spencer, *The European Arrest Warrant*, CYELS, (2003-4) 7, 201-217

¹⁴⁵ Proportionality is a human rights term which will be examined in subsequent chapters. Here the term proportionate is used in its every day meaning, that is to ensure the means are proportionate/appropriate to the ends.

Reciprocity is often branded around as a key element of MR usually in terms of the potential erosion of MR if MSs ask too many questions or refuse too many EAW requests. On the flip-side, if MSs want to continue exercising their new-found powers under the MR measures, they must reciprocate by acting with integrity and responsibility. MSs must refrain from abusing the system by issuing EAWs for persons they want to question as opposed to prosecute. Whilst it is accepted that MSs classify acts differently,¹⁴⁶ MSs also need to ensure that they do not clog up a system which was primarily set up to deal with terrorism, serious organised and cross-border crime, with ‘minor offences’. MSs must be made aware of and be encouraged to use alternative measures for mutual legal assistance and enforcement of financial penalties.¹⁴⁷ The disproportionate use of the EAW not only threatens the MR system itself but may also give rise to a violation of the individual’s HRs.

2.7 Human Rights and the EAW

The positioning of HRs within the EAW system is not explicit but rather vaguely implied. Sanger describes the power struggle with an analogy of a sword and shield whose equality is challenged by the EAW. The sword in his analogy represents the “internal monopoly of force” which the State possesses and uses to impose penalties. The shield represents the individual’s defence rights and due process.¹⁴⁸

Pérignon and Daucé, are in the minority when asserting that the EAWFD actually contributes to the protection of HRs. They note that the EAWFD was drafted with regard to compliance with HRs obligations and includes specific provisions which

¹⁴⁶ The seriousness of the proverbial Polish doors and Lithuanian piglets come to mind. In *Sandru v Government of Romania* [2009] EWHC 2879, a 3 year custodial sentence was imposed for theft and destruction of 10 chickens, in this case Elias L.J. recognised that the appropriate sentence for an offence is in part cultural. See also EU Presidency, *Proposed subject for discussion at the experts' meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 - the proportionality principle*, COPEN98, 9 July 2007, p.3

¹⁴⁷ Such as the EU, *Council Framework Decision on the application of the principle of mutual recognition to financial penalties*, 2005/214/JHA, 24.02.2005, OJ L 076 0016 - 0030

¹⁴⁸ *ibid*

restate these rights.¹⁴⁹ These specific rights-based provisions within the EAWFD focus on the obligations of the E-MS, they include the right of the individual to be informed that an EAW has been issued against them (Article 11(1)), the right to be assisted by counsel and an interpreter (Article 11(2)), if consenting to the surrender, they must be informed of the consequences in particular on the specialty rule (Article 13(2)) and time spent in detention on remand during the EAW proceedings are to be deducted from any term of imprisonment (Article 26). As Pérignon and Daucé remind us, they are not an attempt to harmonise the level of protection at national level, but merely make reference to minimum standards.¹⁵⁰

Whilst some of the grounds address specific HRs concerns, the elephant in the room, is the obvious absence of a free-standing HRs ground reflecting the dubious positioning of HRs and of the true priorities of MSs to date. The mandatory grounds of refusal do not include any of those grounds which raise obligations under the ECHR existing jurisprudence. For example, the bar to extradition when there is a real risk of torture or other Article 3 prohibited treatment.¹⁵¹

HRs are referred to in Recitals 12 and 13 and Article 1(3) EAWFD, however none of the provisions provide a specific HRs ground to be considered when executing an EAW request. Recital 12 refers us to the text of Article 6 EU Treaty, the CFR and the ECHR as general principles to be respected. In addition to the non-specificity of the HRs ‘protection’ the main problem differentiating what is seen on paper and what occurs in practice is the fact that the legal force of Recitals in EU law has not been definitively clarified.¹⁵² The recitals are reassurances that in the global scheme of things, HRs are protected. One of the central failings of this assertion is lack of a clear mechanism for

¹⁴⁹ Pérignon and Daucé (n58) 212-3

¹⁵⁰ *ibid*, 212

¹⁵¹ The applicable rights will be considered in greater detail in Part 2.

¹⁵² T Klimas and J Vaiciukaite, *The Law of Recitals in European Community Legislation*, ILSA J Int'l L, (2008) Vol 15:1

the monitoring and enforcement of the rights and also no clear guidance as to the nature of the rights to be taken into account.

So whilst Recital 13 sets out guarantees against the surrender of an individual “to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. The legal force of such pronouncements in Recitals is not clear.

Article 1 EAWFD concludes with Article 1(3) stating that the EAWFD, “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”

Whilst Keijzer considers Article 1(3) to be a self-standing ground for refusal when taken in conjunction with Article 6 EU Treaty and the Recitals, this is not a widely accepted interpretation. Article 1(3) lacks force and almost certainly was not meant to have the force of a ground to refuse implementation of an EAW. Two points to note at this stage are, firstly Article 1(3) does not guarantee HRs as such, but instead prevents the EAWFD from modifying existing HRs obligations. In this sense it acts as a standstill clause. Secondly it does not provide a ground for refusal to surrender an individual.

Pre-empting difficulties with either their own Constitutions or other international obligations, several MSs departed from the strict text of the EAWFD setting out HRs as a self-standing ground for refusing to surrender an individual. For example in the UK this includes passage of time, extraneous considerations and under section 21 EA compatibility with HRs. The ‘uneven’ implementation leads to discrimination depending on the powers given to the executing judge to review a surrender for consistency with HRs. The scope of the HRs safeguards found in the implementing laws is also not consistent. Those states who have sought to convert the general HRs

consideration into a mandatory ground have faced harsh criticism from both the Council and the Commission who state that whilst they recognize MSs have obligations to respect HRs, they view the manner in which these grounds for refusal have been adopted risks them going beyond the EAWFD ambit. Whilst it is obvious executing judges are obliged to refuse surrender where to do so would violate HRs, the intention of the EAWFD was to concentrate the judicial review powers of executing judges. It concludes that text in the recitals should not be transposed and those MSs “who are of the view that such additional grounds require enactment in their implementing legislation should negotiate those clauses as a matter of course during the debate on the provisions of the instrument.”¹⁵³

This discontent is founded on a prediction that inclusion of a distinct HRs ground would give MSs too much room to manoeuvre and opportunities to create appearances of distrust. This will lead to disparities and issues with reciprocity with an adverse knock on effect on MR. However such anxieties are not sufficient to sideline existing HRs obligations.

MSs have justified this move as necessary for the fulfillment of existing international obligations to protect and respect HRs which Article 1(3) specifically states the EAWFD leaves unmodified. Concern of the differing levels of HRs review and protection offered by some MSs when reviewing EAW requests, would be understandable had these MSs been offering a lower level of protection. The reality is that they are explicitly taking into account HRs as opposed to accepting mere assumptions. The EU states that it is ‘obvious’ judges should not surrender someone where there is proof that this would lead to a serious violation of rights. Since it is also

¹⁵³ EU, *Political orientation debate on issues arising from the Commission’s report of 23 February 2005, based its evaluation of the European Arrest Warrant (“EAW”) and the surrender procedures between Member States and subsequent Member State responses*, 19.05.2005, COPEN 89, 2. See Fichera (n48) 88-89 for an example of some differing implementation such as the inclusion of additional requirements, the understanding of the definition of “competent judicial authority” and the ‘Italian case’. 72

acknowledged that there are differing levels of HRs review, surely it would be better to state the obvious, rather than leave gaps and risk lower levels of protection. Given the differing practice and the number of cases before the ECtHR against MSs, it is ‘naïve’ to assume that the implied protection is sufficient.¹⁵⁴

In *Advocaten voor de Werald*, Advocate-General Colomer states that Recitals 7, 12, 13, 14 and Article 1(3)) illustrate clearly that the EAWFD was adopted with the desire to respect HRs and respect Article 6 EU Treaty. To this end “when there are reasons to believe, the basis of objective elements, that the arrest warrant has been issued for the purpose of prosecuting, punishing or prejudicing the position of a person” on the discrimination grounds or would be subjected to the death penalty, torture or other inhuman or degrading treatment, “the surrender of that individual must be refused”.¹⁵⁵ It is not clear what to make of this statement. If surrender must be refused where there is reason to believe that the above HRs would be violated, surely this formulation equates to an implicit ground for refusal. This interpretation would however appear to run counter to the views of both the Council and Parliament who scorn those MSs who have introduced it as a ground. At closer inspection it seems that their issue is with the nature of such a ground. They dismiss an explicit ground as necessary, stating that such a ground is implicit on the basis of the very foundations of the Union and to explicitly state and consider it undermines MR. In fact Colomer himself tells us that the EAWFD does not only concern bilateral relationships between MSs but also includes a third dimension, the rights of the individual concerned. To that end, had the declaration contained in Article 1(3) EAWFD not been included, it would have still been implicit “since one of the founding principles of the European Union is respect for fundamental rights and fundamental freedoms”. The CJEU in the *Advocaten voor de Werald*

¹⁵⁴ N. Vennemann, *The European Arrest Warrant and its Human Rights Implications*, 63 *ZaöRV* (2003) 103-121

¹⁵⁵ *Advocaten voor de Werald* (n33) Opinion of Advocate-General Colmer, §18.

continues with this line of reasoning recalling that MSs must respect HRs as enshrined in Article 6 EU Treaty and re-stated in Article 1(3) EAWFD.¹⁵⁶ The opportunity to clarify the value of Article 1(3) and the permissibility of a self-standing HRs ground of refusal had been given to the CJEU in a preliminary reference from Belgium. Unfortunately neither the Court nor the Advocate-General felt that it is necessary to answer this question.¹⁵⁷ At the next opportunity, the CJEU was again hesitant to introduce or read in an explicit human ground.¹⁵⁸

Whilst the CJEU has not taken the opportunity, according to Advocate-General Mengozzi in *Lopes da Silva Jorge*, Article 1(3) EAWFD is a reminder that when applying MR in the context of the EAWFD the protection of HRs “must be the overriding concern of the national legislature when it transposes acts of the European Union, of the national judicial authorities when they avail themselves of the powers devolved to them by European Union law, but also of the Court when it receives questions on the interpretation of the provisions”¹⁵⁹ of the EAWFD.

The opposition to an explicit ground still remains unclear. Whilst direct reference is made to HRs obligations, they are not specifically set out. This is not sufficient and the “precise international and EU human rights obligations should have been included into the EAW wording without political fear, to avoid any ambiguity in interpretation.”¹⁶⁰

The importance of the explicit presence of HRs in the process will be explored in later chapters.

¹⁵⁶ *ibid* §53, in its decision the CJEU does not go as far as Advocate-General Colomer’s Opinion. The CJEU merely reminds us that the law of the Member State must respect fundamental rights. It falls short of stating that the requested state must refuse to surrender.

¹⁵⁷ *I.B.*(n118) See also: Theodora Christou and Karen Weis, *The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity*, New Journal of European Criminal Law, (2010) Vol. 1/1

¹⁵⁸ Case C-396/11 *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu* [2013] ECR 00000

¹⁵⁹ *Lopes Da Silva Jorge* (n131), Opinion of Advocate-General Mengozzi

¹⁶⁰ Apap and Carrera (n43) 13

As an ultimate sign of mutual trust, MSs also have the option of making dual declarations under Articles 27(1)¹⁶¹ and 28(1)¹⁶² EAWFD which creates a blanket waiver amongst those MSs who have made such declaration. This coupled with the implied waiver of the specialty rule by the individual when surrendering,¹⁶³ does not create uniformity, but rather a multi-tiered framework with differing levels of trust between MSs, as well as different levels of protection for the individual.

In its current application mutual trust appears to enforce on judges a blind obedience based on the premise that all MSs adequately respect HRs to a comparable level. Judges are asked to have mutual trust in each other's criminal justice system, whilst there is a difference between the minimum standards set out in the ECHR, under which all MSs have existing obligations, and the protection afforded in practice. It is this practice which affects the mutual trust. Sanger points the finger at the newly acceded MSs as representing situations where substantial risks exist that an individual will not receive a fair trial.¹⁶⁴ Whilst it may be true that the legal systems of some newly acceded EU MSs may raise concerns, Sanger fails to note that their legal systems have all recently been evaluated as part of their accession process. The legal systems of the older MSs have not been evaluated for some time and continue to raise issues before the ECtHR. In that sense they both represent a 'journey into the unknown'.¹⁶⁵ To this end consideration may be given to expanding the scope of the European Union's Justice Scoreboard, a non-binding comparative tool on the functioning of the Member State judicial systems.¹⁶⁶ Its current focus is on the contribution of the justice system to the improvement of the business and investment climate, examining efficiency indicators

¹⁶¹ Consent is presumed for the prosecution, sentencing or detention of the individual for a crime other than that for which they were surrendered.

¹⁶² Presumed consent for onward surrender or extradition.

¹⁶³ Under Article 13 EAWFD

¹⁶⁴ Sanger (n94) 23

¹⁶⁵ Mitsilegas, *The constitutional implications of mutual recognition in criminal matters in the EU* (n23)

¹⁶⁶ A link to the 2013 Justice Scoreboard can be found at http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm

for non-criminal cases. It may be useful for it to be expanded to include criminal cases and the respect for rights of individuals.

An assessment of the balance achieved by the EAWFD between ease and speed on the one hand and HRs on the other, illustrates that the balance is not tipped in favour of HRs. It shows that a lacuna exists, a need further acknowledged and evidenced by the fact that the failed 2004 procedural safeguards framework¹⁶⁷ was meant to be in place by the time the EAW entered into force.

Returning to Sanger's sword and shield analogy, in an EAW process two swords are yielded against the individual. One by the I-MS within the E-MS and the second by the E-MS in surrendering the individual, whilst the shield is located out of reach in the I-MS and sometimes further afield in Strasbourg.

2.8 Existing Human Rights Protection

In the context of European criminal law and MR measures, HRs can be potentially protected at three levels: international, EU and national.

At the international level, whilst focus will be on the ECHR, an individual also has recourse to the international treaties and mechanisms of the United Nations.¹⁶⁸ Whilst an individual cannot petition more than one international body at the same time, this is the only restriction and the option as to which one they chose is entirely theirs. There is no obligation for them to petition the ECtHR first. However, in practice the ECHR system is favoured by those seeking to enforce their HRs against a European state.

¹⁶⁷ Commission, Green Paper from the Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, Brussels, 19.02.2003 COM(2003) 75 final

¹⁶⁸ Beyond the so-called 'International Bill of Rights'; composed of the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and their respective Treaty Bodies responsible for monitoring their effective implementation, there are also a number of other Treaties (and their respective Treaty Bodies) on specific rights such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Racial Discrimination. Beyond the Treaty based protection there is also the Charter based protection in the form of the Human Rights Council.

At the EU level an individual can apply to the national court to request a preliminary reference to the CJEU for clarification on a point of EU law. The EU enforcement mechanisms will be briefly considered in Part III. Post Lisbon, an individual can also rely on the CFR to enforce their rights when a MS is implementing EU law, in other words when an EU nexus exists.¹⁶⁹

Last but certainly not least are the national mechanisms available for the protection of HRs. The HRs protection offered by the ECtHR and EU are considered subsidiary to that of the national courts. The Council of Europe and the ECtHR have on a number of occasions stated that it is preferable for HRs to be remedied at the national level. This is reflected in the UK when it chose to enact the Human Rights Act 1998 (HRA) under the banner of ‘Bringing Rights Home’. The HRA places an obligation on the legislator and the courts to ensure that the law is compatible with HRs. To this end Section 21 EA requires that a Part 1 surrender only proceed if compatible with the HRs of the person in respect of whom an EAW is sought.

In theory, the rights of an individual appear to be sufficiently protected via a multi-level system of protection. However, as it will be illustrated, once the principle of MR and its side-kick mutual trust enter the scene, the practice is very different.

¹⁶⁹ The CFR was adopted in 2000 as a declaration with no legally binding effect, however with the entrance into force of the Lisbon Treaty in 2009, it gained binding legal effect. According to Article 51 CFR, this means that both EU institutions and Member States are bound by its provisions when “when implementing EU law”. See Chapter 4 where the scope and justiciability of the CFR are discussed in greater detail.

Chapter Three: Conclusion

The principle of MR was not only adopted to facilitate the operation of MS criminal justice systems, but also to protect HRs. Nevertheless, with the added impetus of the 9/11 attacks, what had till then been a slow process has led to the adoption of numerous measures in the field including the EAWFD.¹⁷⁰ Whilst the adoption of MR as the basis for procedural criminal measures was a success in terms of speeding up their adoption, it has not been without criticism. Originally an internal market principle, some regard its unmodified application to criminal matters as ‘deeply flawed’. Reasons for this belief include the subject matter (goods and services in the internal market and individuals in criminal matters) and the lack of equivalence (the internal market was subject to EU minimum standards whereas in criminal matters the reliance is on individual MS definitions and their national systems to respect due process and the rule of law whilst the HRs protection is also delegated by the EU to the ECtHR and to national systems and constitutions).

The adoption of MR has not negated the need for parallel harmonization.

Harmonisation has occurred in substantive criminal areas (e.g. human trafficking) as well as procedural aspects (e.g. the form used for EAW requests). Harmonisation of defence rights and procedural guarantees is also being witnessed through the adoption of the Stockholm Roadmap measures. Further harmonisation in the future of other aspects of criminal law and HRs has not been discounted and on the contrary appears highly likely. The adoption of minimum standards on HRs is now seen as strengthening

¹⁷⁰ These include: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

MR. In addition the creation of a stronger and more joined up framework within which the MR measures will operate is also regarded as promoting MR. For example the operation of the EAWFD is supported by measures dealing with the ability of MSs to accept payment for financial penalties.

Given its successes in terms of MS implementation and use, the EAWFD is regarded as a blueprint for MR measures. The EU regards the EAWFD as an entirely new system which replaces extradition between EU MSs. Whilst there are a number of benefits flowing from the implementation of the EAWFD (i.e. the deletion of the extradition muddle that existed before), there are limits to its accomplishments including the extent to which mutual trust exists. For example, the speeding up of the process through the reduction of grounds upon which surrender can be refused is muted by the concerns that the individual is not adequately protected in the process.

The negative views of the EAW process largely relate to the inadequate protection of HRs. Under the MR mechanism it is not only decisions but also violations which have wider jurisdictional reach. Rights (and justice for the wanted individual) appear in second place after security and ensuring the free movement of criminal justice. The most obvious HRs gap is the absence in the EAWFD of an explicit ground of refusal on the basis of HRs. At the time of adopting the EAWFD membership of the ECHR by all MSs was regarded sufficient HRs protection. Even though in theory this may be a sound policy, the practice of MSs including the numerous findings of violations by the ECtHR justifies the questioning of this basis for mutual trust. Through the adoption of the Stockholm Roadmap a clear shift is seen with the importance of EU minimum standards for defence rights now regarded as a necessary partner for the continued success of the EAW and MR measures.

In the following chapters the impact of the EAWFD on HRs will be considered together with the existing HRs obligations of MSs.

Part II: Human Rights

Chapter Four: On Human Rights

As detailed in Chapter 1, the operation of the EAWFD raises a number of issues concerning the HRs protection of the individual. This Chapter will set out the relevant HRs, the appropriate minimum standards according to the ECHR, the differing levels of protection in the EU and their applicability to EAW proceedings.

4.1 Unavoidable Human Rights obligations

“Slavish adherence to the principle of mutual trust cannot override the positive obligation to secure the protection of rights guaranteed under the ECHR irrespective of any legal obligation created by EU law.”¹⁷¹ These obligations do not only exist under the ECHR, but also at EU and national levels.

The continued applicability of HRs within the MR framework is important. Peers has pointed out the anomaly where in the MR of judgments in civil matters 'public policy' grounds, including HRs, are a mandatory ground for refusal to execute the relevant order. In criminal matters, where these 'public grounds' are central factors, this is not the case. MR measures in criminal matters, such as the EAWFD, do not include as one of their grounds for refusal 'public policy' grounds. On the contrary, public policy provides a ground for the execution of EAW requests.

Mutual trust in criminal matters is of course not without any foundation. According to Mitsilegas,

Mutual Recognition in criminal matters remains a limited form of integration which is not devoid of (domestic) constitutional checks and

¹⁷¹ Adam Lazowski and Susan Nash, 'Chapter 3: Detention,' in Keijzer and van Sliedregt (n81), 49

balances...the respect by all EU Member States of fundamental rights, provides the foundation for mutual trust.¹⁷²

Commentators agree that MR is reliant on guarantees of fundamental rights and whilst the EU has also recognized this for a long time MSs continued to put their national interests first, focusing on security and repeating the mantra that all MS are parties to the ECHR thus providing sufficient protection of HRs. Therefore in accordance with mutual trust no further work would be required on protecting HRs – to this end mutual trust could be seen as anathema to HRs protection.

It is true that all MSs are parties to the ECHR and Article 6 of the Treaty of Amsterdam¹⁷³ reaffirms respect for HRs as a key principle of the EU. Therein lays the sole justification for MR without further formalities. Success of MR relies on MSs having mutual trust and confidence in one another's criminal justice systems. The underlying assumption is that MSs are able to guarantee HRs and trust that others can too. The problem is that the premise all MSs fully respect HRs is a political illusion of convenience not reflected in the case law either at national level or at regional level.

Despite different approaches and outcomes, the decisions need to be accepted as equivalent to decisions of their own system.¹⁷⁴ The limited grounds for refusing to implement an EAW request means that there will be instances where MS will be satisfying the MR requirement but may well be acting counter to their HRs obligations.¹⁷⁵ Article 1 ECHR obliges MS to guarantee the rights of everyone “within their jurisdiction”. This is not a territorial jurisdiction, cases have clarified that this

¹⁷² Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law* (n17) 318

¹⁷³ As it then was when the EAWFD was adopted, now Article 6 TEU, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, OJ C 306 of 17 December 17.10.2007. Consolidated version of the *Treaty on the European Union* and the *Treaty on the Functioning of the European Union*, OJ C 115 of 09.05.2008 (Lisbon Treaty)

¹⁷⁴ This approach is best illustrated in the jurisprudence of the CJEU in relation to the principle of *ne bis in idem* under Article 54 of CISA.

¹⁷⁵ See amongst others, Guild, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice* (n19) 225

obligation can have not only extraterritorial jurisdiction,¹⁷⁶ but that where an individual is in their jurisdiction, an act (such as extradition) can have the ability of extending the obligations to ensuring protection in another state.¹⁷⁷ Peers affirms that,

in the sphere of criminal law, a State which assists another Member State cannot simply disown responsibility for what happens on that other Member State's territory, particularly where it exercises coercive power by detaining or removing a person, imposing a criminal penalty, searching and seizing property, or otherwise confiscating or freezing assets.¹⁷⁸

With the obligation on all MS to respect the HRs set out in both the ECHR and other sources, how can MR be used as a justification for abrogating from them or allowed to trump them.

The following sections will explore in greater detail the relevant rights and show that the obligations stemming from the ECHR oblige States to ensure that the guaranteed rights are “practical and effective” and not “theoretical and illusory”.¹⁷⁹ MSs need to realize that enforcing and reinforcing HRs is not counterproductive to their aims to maintain security. On the contrary respect for HRs is an important element of the rule of law which in itself is imperative for any democratic and proper functioning State.

4.2 The Threefold Protection

This section highlights the existing protection and positioning of HRs within the EU legal order. What it highlights is the subsidiary nature in favour of reliance on the Council of Europe mechanism and in particular the ECtHR.

It is accepted that no state, other than the fictional State of Utopia, will achieve perfect HRs compliance. Confidence in each other's systems can however be increased through the knowledge that systems are in place, which are at least comparable to a MS's own

¹⁷⁶ See amongst other cases *Cyprus v Turkey*, 25781/94, [GC] judgment 10.05.2001

¹⁷⁷ *Soering v UK*, 14038/88, judgment 7.07.1989

¹⁷⁸ Peers, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?* (n38) 24

¹⁷⁹ See also Maria Fletcher, *Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge*, MLR (2003) Vol. 66, 769-80, 778

and attempt to ensure a high respect for HRs and to provide a remedy when the system fails. Due to a combination of lobbying by NGOs,¹⁸⁰ the Commission's own evaluation reports¹⁸¹ and the developing national and European case law, MSs have slowly realised the importance of embracing HRs as part of the MR measures. In its own way that is what the Stockholm Roadmap has embarked on, to put in place minimum standards applicable across the EU. Questions exist as to whether the measures adopted will be sufficient, and whether implementation in practice will be effective.

In the context of the EAW, HRs at the EU level are protected by Article 6 EU Treaty as referred to in both Recitals 12 and 13 and Article 1(3) EAWFD. These provisions provide a threefold protection of HRs and is often replicated in other MR instruments in the field of criminal law.

The three-pronged protection refers to Article 6 EU Treaty (its text is only slightly amended by the Lisbon Treaty now Article 6 TFEU) which (1) recognises the rights, freedoms and principles set out in the CFR which “shall have the same legal value as the Treaties.” (2) the EU is to accede to the ECHR, leaving unaffected “the Union's competences as defined in the Treaties.” (3) “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.” All three are clearly complementary and not mutually-exclusive.

¹⁸⁰ In the UK NGOs with notable work on the EAWFD include, Fair Trial International, Justice, Liberty and The AIRE Centre.

¹⁸¹ Commission, *Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11.07.2007 COM(2007) 407 final and Commission, *Report from the Commission to the European Parliament and the Council, On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11.04.2011, COM(2011) 175 final

Individual rights and mechanisms arising from the operation of the EAW are not however specified in the text of the EAWFD or Article 6 EU Treaty and so it is necessary to turn to the CFR and the ECHR to identify precisely what the individual rights are and to the CJEU and the ECtHR case law in order to fill in the details and establish how these rights should be protected and how they are enforced in practice. Central to this is also the question of the monitoring and enforcement mechanisms.

4.3 Human Rights in the EU

Article 6 EU Treaty offers a three layer protection composed of the CFR, ECHR and general principles of the EU. The CFR is not a new expression of HRs but a codification of existing rights derived from the ECtHR and CJEU jurisprudence. The CFR goes further than the ECHR in terms of scope and also rights drawing from principles of social justice. In addition, the ECHR forms an integral source of fundamental rights in the EU. Whilst the EU is not yet legally bound by the jurisprudence of the ECtHR, the jurisprudence of CJEU and the ECtHR have a complementary effect on HRs in the EU.

The three layered protection set out in Article 6 EU Treaty is the most often cited treaty base for HRs protection in the EU; Article 2 provides the constitutional guarantee that all acts of the EU will respect HRs. However, it was only from the Maastricht Treaty onwards that it was expressly provided that the EU shall respect HRs as guaranteed by the ECHR.¹⁸² Before then, development of HRs in the EU was through the referral of questions to the CJEU asking questions concerning the guarantee of rights within the

¹⁸² Whilst reference is made explicitly to the ECHR, the CJEU has not felt constrained by this and has taken into account obligations under other international treaties. For example in Case C-244/06, *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-00505, §39,

...the protection of the rights of the child is recognised by various international instruments which the Member States have cooperated on or acceded to, such as the International Covenant on Civil and Political Rights, [...], and the Convention on the Rights of the Child [...]. The Court has already had occasion to point out that those international instruments are among those concerning the protection of human rights of which it takes account in applying the general principles of Community law...

EU legal order.¹⁸³ The case law of the CJEU on HRs can be traced back to 1969 with the *Stauder* case.¹⁸⁴

MSs also remain bound at a national level to international treaties which may also impact on the implementation of EU obligations. This multilayer protection acts to protect HRs at varying degrees at the national and EU levels; with enhanced protection for certain rights offered at one or other level.¹⁸⁵

In protecting HRs the EU also refers to the ‘general principles’ of the EU. These ‘general principles’ remain undefined in the Treaties, however many can be elicited from the case law of the CJEU. In his report Besselink refers to several examples;¹⁸⁶ the one most relevant to the EAWFD is the extension of the right to be heard to proceedings which fall outside Article 6 ECHR. For example, in *Hoffmann-la Roche*, the CJEU acknowledged that the right to be heard in administrative proceedings where the proceedings “are liable to culminate in a measure adversely affecting that person”.¹⁸⁷ The retention of the phrase ‘general principles’ in the Lisbon Treaty despite the legal binding effect given to the CFR means that the CJEU is free to recognise and identify rights as they arise over time.¹⁸⁸

Treaty protection initially saw as a guideline for HRs protection the common constitutional traditions as general principles of the MSs together with the international

¹⁸³ Leonard F.M.Besselink, *The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, FIDE Congress, 2012.

¹⁸⁴ *Stauder* (n411), §7; Case 11/70 *Internationale Handesgesellschaft* [1970] ECR 1125, §4; *Nold* (n411); Case 36/75 *Rutili* [1975] ECR 1219; Case 149/77 *Defence v Sabena* [1978] ECR 1365; Case 44/79 *Hauer* [1979] ECR 3727; Case 222/84 *Johnston* [1986] ECR 1651; Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR I-2859; Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 [1991] ECR I-2925; Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* (‘ÖRF’) [2003] ECR I-4989; and Case C-275/06 *Promusicae* [2008] ECR I-271.

¹⁸⁵ Besselink (183), 4-10

¹⁸⁶ Besselink (n183)

¹⁸⁷ Case 85/76 *Hoffmann-la Roche v. Commission* [1979] ECR 461, § 9

¹⁸⁸ For further discussion see: J Dutheil and D Rochère, ‘*The EU and The Individual : Fundamental Rights In The Draft Constitutional Treaty*’ (2004) 41 Common Market Law Review, 345; F Tulkens, *Towards a Greater Normative Coherence in Europe/The Implications of the Draft Charter of Fundamental Rights of the European Union*, HRLJ, Vol.21, No.8

treaties they had signed up to. Constitutional traditions still play a role as evidenced in the *Omega* case and act not only to protect the right of a citizen but may also restrict their rights.¹⁸⁹ The *Omega* case concerned the banning of a laser game by the German police which involved shooting both fixed targets and tags on other player's jackets because it simulated homicide and trivialised violence. The prohibition was based on the German Constitutional principle of human dignity.

... human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment, and that, in national law, the fundamental rights invoked by Omega cannot alter that assessment.¹⁹⁰

Because of the existence of an EU nexus, namely that the equipment was supplied by a British company and therefore engaged freedom to provide services and goods, the question was referred to the CJEU as to whether these freedoms can be restricted under national law because it offends values enshrined in the German constitution. The CJEU held that restriction of the freedoms is permitted on a public policy ground. Whilst the ground must be determined strictly by the CJEU, it also recognised that the justification for recourse to the ground may vary between MSs and also from one era to another and therefore afforded MSs “a margin of discretion within the limits of the Treaty”.

It recalled that the Community's general principles are drawn from the Constitutional traditions of the MSs and in line with the Opinion of the Advocate-General¹⁹¹ the Community legal order also strives to ensure respect for human dignity as a general

¹⁸⁹ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] I-09609

¹⁹⁰ *ibid* §12

¹⁹¹ *ibid*, Opinion Of Advocate-General Stix-Hackl

principle of law,¹⁹² thus finding its protection to be compatible with Community law; “the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services”. However, such restrictive measures can only be justified if necessary to protect the intended interests and these objectives cannot be attained by less restrictive measures. A common conception amongst MSs, as to how a right is to be protected, is not a necessary criterion for assessing the proportionality of a restricting national measure. Thus in answer to the question the CJEU held that a national prohibition measure adopted on public policy grounds to protect human dignity is not precluded under Community law. This conclusion is by virtue of the fact that human dignity is not restricted to the German Constitution but rather because it also forms part of the EU general principles.

The CJEU has also relied on the HRs as they result from the Constitutional traditions of MSs to justify MR and in particular the abolition of dual criminality for 32 offences under the EAWFD.¹⁹³

Article 51(1) CFR clearly states that EU HRs obligations are only binding on MSs when implementing Union law. The explanatory text of the CFR¹⁹⁴ refers to three CJEU cases including the *Wachauf* and *ERT* cases. These two cases are at different ends of the interpretation scale.¹⁹⁵ *Wachauf* refers to situations where MSs implement an EU law mandate, whereas *ERT* cases “concern autonomous Member State action, so action by a Member State authority mandated by its strictly national law, which restricts the exercise of an economic Treaty freedom and hence comes within the scope of EU law.” In the *ERT* case the CJEU held that,

¹⁹² Human dignity appears in Article 1 CFR as well as Article 2 of the EU Treaty.

¹⁹³ *Advocaaten voor de Wereld* (n33) §49

¹⁹⁴ OJ, 2007/C 303/17

¹⁹⁵ Besselink (nError! Bookmark not defined.), 26

where a Member State relies on an overriding requirement relating to the public interest or on grounds for justification that are stipulated in the Treaty in order to justify a national rule which is likely to obstruct the exercise of a fundamental freedom arising from the Treaty, such justification 'must be interpreted in the light of the general principles of law and in particular of fundamental rights'.¹⁹⁶

Since the Lisbon Treaty granted primacy to the CFR, the CJEU has appeared at times to avoid determining the scope of the CFR. For example in *Zambrano*¹⁹⁷ it decided the case without reliance on the CFR despite the fact that the referred question explicitly refers to the CFR. In this case provisions of the primary legislation were adequate to answer the referred question and to protect the rights of the individuals concerned. Although reference to the CFR and HRs is made extensively in the linked Opinion of Advocate-General Sharpston who holds that the granting of HRs to citizens which Article 6(1) states is the very foundation of the EU has meant that “the principle that citizens exercising rights to freedom of movement will do so under the protection of those fundamental rights”.¹⁹⁸ She relies on both Article 21 TFEU and HRs to justify the proposed prohibition of reverse discrimination. There are also cases post-Lisbon where reliance is mainly based on the CFR, with the ECHR being used as a tool of interpretation or the starting point.

As is evident in its case law, the CJEU is developing its own ‘margin of appreciation’ principle, referred to as a margin of discretion;¹⁹⁹ where national measures are respected provided that they respect the minimum standards. This is evident in the application of the MR principle, where differences in the criminal justice system are accepted and accommodated on the presumption that the minimum safeguards are in place. Thus respecting the different societal values and legal heritages of the MSs whilst encouraging respect for HRs.

¹⁹⁶ *Omega* (n189), Opinion of Advocate-General Stix-Hackl §42

¹⁹⁷ *Zambrano* (n505)

¹⁹⁸ *ibid*, Opinion of Advocate-General Sharpston, §129

¹⁹⁹ *Wolzenburg* (n128)

The Council of Europe and the EU are not competitors but complementary mechanisms for the protection of HRs. This complementary role has been acknowledged by the CJEU; for example in *Dereci* it reminds national courts that they,

must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.²⁰⁰

Through the *Şirketi* decision the ECtHR has also indicated to the EU that it needs to ensure that equivalent protection is offered to individuals.

The relationship between the ECHR and the CFR is one with which the CJEU is still working out. In Case C-571/10 *Servet Kamberaj*,²⁰¹ a case concerning social security, the CJEU held that the ECHR does not have primacy over national laws within the EU legal order. In assessing the social security provisions the CJEU refers to Article 34(3) CFR, which ‘recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national laws and practices’. In addition to illustrating the progressive nature of the CFR (this right does not appear in the ECHR), it has been taken as an indication of the direction the CJEU is heading with fundamental rights – preferring to rely on the CFR. This would seem to be confirmed by the case of Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*²⁰² which considered the ne bis in idem principle in relation to tax. In doing so the CJEU extends the meaning of Article 51(1) CFR as not only when ‘implementing’ EU law but also matters which fall “within the scope of EU law”. The judgment cross-references the *Melloni*²⁰³

²⁰⁰ *Dereci* (n511) §72-73

²⁰¹ (Grand Chamber) 24 April 2012

²⁰² (Grand Chamber) of 26 February 2013

²⁰³ *Ibid* n.122

judgment (decided on the same day), confirming that when the issue only partly concerns EU law, “national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.”²⁰⁴ It will be interesting to see in future judgments whether the CJEU meant to extend the application of the CFR to national measures whose objectives are set at the national level on the basis that the objectives are in common with EU legislation.

In the same case, the CJEU also considers the relationship of the CFR with the ECHR, stating that,

the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.²⁰⁵

Here recognition is given to the continuing obligation Member States have under the ECHR, but also that primacy of the CFR within the EU legal order, whilst having one eye on accession by the EU to the ECHR which will add another dimension to fundamental rights adjudication in the EU.

Thus whilst the CJEU’s shift towards reliance on the CFR has begun it is not consistent, with the ECHR continuing to be referred to and the jurisprudence of the ECtHR

²⁰⁴ *ibid* n.202 §29

²⁰⁵ *ibid* n.202 §44

remaining the underlying starting point and guidance. For this reason, the ECHR jurisprudence forms the basis of human rights analysis in Part II.²⁰⁶

In addition to the national systems, it is also important to set up and reinforce regional and collective mechanisms of monitoring. These will set to rest the minds of national judges that they are not the lone guardians of rights within the European criminal justice sphere and would also serve as a stronger foundation for their mutual trust. This has been recognised from the start by the Commission and Council.²⁰⁷

4.4 EU Accession to the ECHR

A significant contribution of the Lisbon Treaty to the protection of HRs, is the legal competence of the EU to accede to the ECHR. Whilst a detailed consideration is beyond the scope of this research, an outline is provided of the key factors in order to understand how the relationship between the two regional courts could work. This relationship has an important role to play in the protection of HRs in the context of MR measures.

Article 6(2) of the TEU²⁰⁸ opens the road to negotiations between the EU and the Council of Europe with the aim of agreeing the terms of EU accession to the ECHR.²⁰⁹

²⁰⁶ The CJEU's attempts to clarify the applicability of the CFR can be seen in the recent opinion of Advocate-General Cruz Villalón in the pending case C-176/12 *Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, 18 July 2013 where this time it looks at the horizontal effect as to whether relationships between private parties are governed by the CFR rights. Whilst the Advocate-General notes that the answer will differ for the different rights, in considering the Social Rights, the conclusion is that they establish principles which govern the exercise of public power and are objectives to be achieved. However the Directive in question was to be regarded as an implementing act which cements the principle, forming a right which can be enforced by the CJEU.

²⁰⁷ The Council of Ministers, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 30.11.2000 [2001] OJ C 12/10, highlights the importance of evaluation and monitoring.

²⁰⁸ Protocol 8 to the Lisbon Treaty (n173) sets out a number of additional requirements for the conclusion of the Accession Agreement. Protocol No. 14 to the ECHR, adopted in 2004 and entered into force on 1.06.2010, amended Article 59 of the ECHR to enable the EU to accede to it.

²⁰⁹ The relationship between the EU and the ECHR as well as the former's accession to the ECHR has been the subject of many discussions and papers. It is beyond the scope of this thesis to discuss in any great detail the technical and practical implications of this accession. The legal and technical issues were considered in a report by the CDDH in 2002: *Study of Technical and Legal Issues Of A Possible EC/EU Accession To The European Convention On Human Rights*, Report adopted by the Steering Committee

To this end under the Steering Committee for Human Rights (CDDH), an Informal Working Group on the Accession of the European Union to the European Convention on Human Rights ('CDDH-UE')²¹⁰ was set up to see through the negotiations with the Commission.²¹¹ In total there were 8 meetings held including 2 with civil society. At the end of June 2011, the Working group deemed its mandate complete and has set out the results of its discussions in a Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ('Draft Accession Agreement') and the Draft Explanatory Report.²¹² They were examined and adopted at the extraordinary meeting of the CDDH in October 2011.

In terms of who an application will be made against before the ECtHR, a co-respondent procedure is envisaged where both the MS and the EU will be the respondents.²¹³ The previous proposed format for co-respondent procedure has the danger of being overused and placing unnecessary financial and other burdens on applicants. The draft trigger for co-respondent procedure is a 'substantive link with EU legal acts or measures' and where EU law provides the 'legal basis' for the act for whose implementation a MS is

for Human Rights (CDDH), DG-II(2002)006 [CDDH(2002)010 Addendum 2], available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/Study_accession_UE_2002_en.pdf. All that is done here is to introduce some of the issues which may affect the protection of human rights in criminal matters. See also: Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, HRLR (2011) 11 (4): 645-682., Tobias Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 CML.Rev (2011)1025, Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, MLR, (2013)76: 254-285, Françoise Tulkens, 'EU Accession to the European Convention on Human Rights', at European Judicial Training Network – Human Rights and Access to Justice Seminar "Effective Remedies, Lengthy Proceedings and Access to Justice in the EU: Ensuring the right to a fair trial under the Charter of Fundamental Rights of the EU and the European Convention on Human Rights", Poland, 1.03.2013, Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, Eur.J.Int.Law (2012) 23 (2): 401-424

²¹⁰ The Committee of Ministers adopted, ad hoc terms of reference for the CDDH to elaborate, in co-operation with representatives of the EU, a legal instrument, or instruments, setting out the modalities of accession of the EU to the European Convention on Human Rights, including its participation in the Convention system (CM/Del/Dec(2010)1085, of 26.05.2010).

²¹¹ The Council of the EU adopted on 4.06.2010 a Decision authorising the Commission to negotiate an agreement for the EU to accede to the Convention.

²¹² CDDH Informal Working Group On The Accession Of The European Union To The European Convention On Human Rights (CDDH-UE), *Final Version Draft legal instruments on the accession of the European Union to the European Convention on Human Rights*, CDDH-UE(2011)16. Presented at the 8th Working Meeting of the CDDH-EU with The European Commission, 20 June-24.06.2011

²¹³ The co-respondent procedure is set out in Article 3 (1)-(5) of the Draft Accession Agreement.

responsible. Issues raised by the co-respondent procedure were effectively dealt with in the joint submissions to the CCDH-UE by the AIRE Centre and Amnesty International.²¹⁴ As one example of where the co-respondent procedure would be inappropriately engaged, they include the practical application of the EAWFD where a MS surrenders an individual to face detention conditions which do not comply with ECHR minimum standards. Here they argue that whilst the subject matter may be EU law, the implementation in violation of the ECHR is the responsibility of the MS in exercising their discretion and a situation where the EU should not be a co-respondent, but rather invited as a third party intervener. Their recommendations centred on clarifying where the third party avenue should be preferred.²¹⁵ The draft took into account these concerns and states that a third party intervention will often be the most appropriate and the co-respondent procedure triggered in a limited number of cases.²¹⁶

Recalling Article 52(3) CFR, in relation to whether the ECtHR or the CJEU should first adjudicate on matters. The provision makes clear that it does “not prevent Union law providing more extensive protection”, it also indicates that the ECHR provides for many of the HRs EU law protects. The AIRE Centre and Amnesty International therefore conclude that logically in cases concerning both CFR and ECHR, it would be more appropriate for the ECtHR to rule first. “Such rulings should not however prejudice a ruling from the CJEU or the domestic courts of the EU’s Member States that EU law provides greater protection”.²¹⁷

The draft accession agreement was then submitted to the Committee of Ministers of the Council of Europe where negotiations have come to a halt. Besselink summarises that the ‘stalemate’ whilst raising serious concerns, were not related to the increased

²¹⁴ AIRE Centre and Amnesty International, *Submissions to CDDH-UE March 2011*, 20/03/2011. Available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/AIRE&AI_comments_March2011.pdf

²¹⁵ *Draft Explanatory Report*, CDDH-UE(2011)16 §40

²¹⁶ *ibid* §44

²¹⁷ Submissions (nError! Bookmark not defined.) §15

protection of the rights of citizens, “nor about a coherent system that is transparent and understandable enough for those same citizens. Actually, the accession negotiations give more the impression of a diplomatic game in which MSs and EU institutions struggle over their privileges than a process of sincere constitution making in the service of the citizens.”²¹⁸

On 13 June 2012 the CCDH was given a new mandate by the Committee of Ministers to negotiate in an ad hoc group with the EU to finalise the instruments for accession.²¹⁹ On 5 April 2013 a revised set of draft instruments were agreed.²²⁰

The key provisions to consider are those on the co-decision procedure and the relationship between the two Courts. On the co-respondent mechanism, it is still emphasised that third party interventions will often be the most appropriate way to involve the EU with the co-respondent mechanism being applied in limited instances. The co-respondent mechanism is triggered in two ways. Firstly under Article 3(2) where the application is against one or more EU MSs the test is fulfilled if the State(s) could not have avoided the alleged violation without disregarding EU law. This will arise where the State has no discretion as to the implementation of the EU law at national level. Under Article 3(3) where the EU is notified of an application not a MS, the State may become a co-respondent. The mechanism will be applied either at the invitation of the ECtHR or by decision of the ECtHR upon request.

On the relationship between the two Courts, it is first noted that whilst under Article 267 TFEU national courts are able to refer questions to the CJEU, parties in the case

²¹⁸ Besselink (183) 41

²¹⁹ The package of instruments include: a draft Agreement on the Accession of the EU to the ECHR; a draft declaration by the EU, a draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party; a draft model of Memorandum of Understanding and a draft explanatory report to the Accession Agreement.

²²⁰ Council of Europe, Fifth Negotiation Meeting Between The CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, *Final report to the CDDH*, 47+1(2013)008, Strasbourg, 5.04.2013

may only make a suggestion that such reference is made. As such the CJEU is not regarded as a 'national court' and the procedure is not to be regarded as a remedy which applicants must first exhaust before applying to the ECtHR. Instead it is guided by the principle of subsidiarity. In situations where the CJEU had not had the opportunity to rule on the matter, an internal EU procedure to be developed whereby the CJEU would have the opportunity to assess the compatibility, not of the act or omission but the EU legal basis (this assessment is not binding). This procedure would apply only where the EU is a co-respondent, it would take place before the ECtHR rules on the merits of the case, all parties would have the opportunity to submit observations in the CJEU procedure and the assessment will not be binding on the ECtHR. The exact internal mechanisms to be applied by the EU for both the co-respondent and prior involvement procedures have yet to be determined and thus consideration of these is premature.

Before the instruments are adopted there are a number of political loops to be jumped. The first stage is for the CJEU to provide its opinion on the draft Accession Agreement, and then the CDDH will approve it and send it to the Committee of Ministers. The ECtHR will next adopt its opinion on the draft Accession Agreement after which the Parliamentary Assembly will adopt an opinion on it before it is adopted by the Committee of Ministers and opened for signature.

A question raised is whether the *Şirketi* doctrine of equivalent effect will continue to be applied. On the one hand the increased powers of HRs protection under Lisbon merit the continuation of those presumptions *vis a vis* the EU; on the other hand the legal significance of accession to the ECHR by the EU is to permit external scrutiny of its acts by the ECtHR. This is a decision which too date has been left to the ECtHR to determine.

4.4.1 Lesser Rights? Absolute and Other Rights

Before considering the relevant substantial rights it is important to be familiar with the general concepts and principles of the ECHR which assist in the interpretation and application of the rights.

Wouters and Naerts submit that “human rights concerns are the main acceptable reason for a lack of mutual trust”.²²¹ They refer to the European Parliament's resolutions concerning HRs in the EU to highlight the fact that, despite membership to the ECHR by all MSs, these reports note violations of the right to a fair trial in almost all MSs. However they note that whilst the ECHR prohibits extradition where the person may face treatment contrary to Art 3 or ‘a flagrant denial of justice’, ‘lesser’ violations of rights - even though not ideal –should not present a bar to surrender. This is an untenable stance; a violation of a HR is a violation and therefore a breach of the ECHR no matter how others perceive its seriousness. Those who assert that, where the violation of their HRs is not severe, individuals can still be surrendered are mistaken. The confusion is between an interference with a right and an ‘interference’ which equates to a violation. If a violation is found to exist it means that the interference has met the threshold and with qualified rights is not justified, even on public interest grounds, in the pursuit of justice or in the fulfillment of international obligations. The distinction in the ECHR between absolute and qualified rights provides the necessary balance between rights and effective criminal justice systems.

An absolute right is one which cannot be interfered with in any circumstance. Articles 2²²² and 3²²³ are regarded as,

²²¹ Wouters and Naert (n123) 923

²²² Right to life

²²³ Prohibition against torture, inhuman and degrading treatment. Other absolute rights are 4(1) (slavery) and 7 (non-retroactive penalties).

the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe. In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.²²⁴

Interference with substantively qualified rights, those guaranteed under Articles 8-11, can in certain circumstances be justified and are capable of derogation under Article 15. Provisions guaranteeing these rights set out the right in the first paragraph, the second paragraph stipulates the conditions under which interferences with the right in question would not constitute a violation of the Convention.

The Court has established a number of questions which need to be addressed in order to ascertain whether there has been a violation of the substantively qualified rights: (1) Do the facts disclose a protected right? (2) Is there (or would there be) an interference with that right? Is the interference (3) in accordance with the law? (4) in pursuit of a legitimate aim? (5) proportionate to the legitimate aim? If the answer to questions 3-5 is negative then the interference is not justified and a violation will be held.

Those rights relating to the administration of justice are limited rights.²²⁵ Interference with these rights will be subjected to a proportionality test. This principle has been developed by the jurisprudence of the ECtHR and states that a fair balance between the protection of individual rights and the interests of the community at large can only be achieved if restrictions on individual rights are strictly proportionate to the legitimate aim they pursue.

There are a number of key tests that can be applied when assessing whether or not interference has been proportionate: Have 'relevant and sufficient reasons' been advanced for any interference with an ECHR right? Is it 'necessary in a democratic society' or does it correspond to a 'pressing social need'? Is there an alternative which

²²⁴ *Pretty v. UK*, 2346/02, Judgment 29.04.2002

²²⁵ These include: Articles 5, 6, and Articles 1, 2, 3 and 4 of Protocol 7.

would have interfered less? Has it been considered? Have relevant and sufficient reasons been given for rejecting it? What is the possibility of abuse? Were procedural safeguards both in place and observed so as to avoid the possibility of abuse? Does the interference operate so as to ‘impair the very essence of the right’?

Another principle applied is that of the ‘margin of appreciation’. Taking into account their widely different social, cultural, economic and legal systems the ECHR, unlike the EU, does not demand the same standards to be applied uniformly throughout the MSs of the Council of Europe. As long as the States have ‘secured’ the rights, as required by Article 1 ECHR, they have a margin of appreciation as to how they do so. Whether this margin is wide or narrow will depend on the right involved and the circumstances of the case.

Where evidence shows that there is a real risk that an absolute right will be interfered with, surrender should be refused. On the other hand where evidence shows that there is a substantial risk that a qualified right would be interfered with; this will not always mean that surrender is to be refused. The combination of thresholds, proportionality and the margin of appreciation, are already in place to deal with the ‘lesser’ interferences with HRs. Where the surrender would lead to an unjustifiable interference with an individual's right, which equates to a violation, it should not and cannot proceed.

4.4.2 Systemic, Group or Individual-Specific Violations

Something that will be explored in subsequent sections is the justification for MSs to continue sending individuals to countries where complaints of violations have been upheld by the ECtHR. One such example is continued surrenders to Poland despite a number of recent findings by the ECtHR that the level of overcrowding in some Polish prisons violates Article 3 ECHR. This example highlights the difference between systemic problems and the need to show that the individual in question will be subjected

to the unjustified risk. Ordinarily, individuals are required to show that the risk will affect them directly. For example, if the ECtHR has held that overcrowding in Prison A in Country X has reached the threshold of Article 3, an individual resisting surrender to Country X will need to show that they will be placed in Prison A.²²⁶ It is not enough to rely on the finding in relation to Prison A to mean that being placed in any prison in Country X would violate their Article 3 right. On the other hand, if it can be shown with some certainty that the individual will be placed in Prison A they can rely on the ECtHR's finding to resist surrender. The reason for this would be the fact that they would become members of the prison population of that institution who are being subjected to conditions in violation to Article 3.²²⁷ This will be subject to the nature of violation found by the ECtHR and that complained of, for example if the violation related to the inadequate health care offered and the complaint concerned the cell conditions, the finding by the ECtHR would not be sufficient.

4.4.3 The Relevant Rights

MSs have all been subject to HRs obligations since at least the mid 20th century and some for many more centuries. More recently the EAWFD introduced further obligations on states. Whilst the EAWFD builds on the existing obligations flowing from extradition treaties, the tremendous weight given to the principle of MR coupled with the obligation to bring fugitives to justice increases the need for ensuring that an individual's HRs are not entirely nullified. The EAWFD alters the balance between the individual rights and the criminal justice mechanisms of the state. Important changes are also introduced to the criminal justice framework with an increase in the fluidity of decisions at the same time as the erection of a steel veil over the internal systems. The

²²⁶ See section on Prison Conditions for UK cases where surrender was resisted on the basis of findings on overcrowding.

²²⁷ Membership of a particular group is now sufficient following the judgment in *Salah Sheekh v the Netherlands*, 1948/04, Judgment 11.01.2007, where it was sufficient for the individual to show that he was a member of the minority clan in Somalia which was being persecuted and subjected to treatment in violation of Article 3 in Somalia. He did not have to show an individual and personal risk.

practical impact of the EAWFD on HRs is significant, with the judges as the only buffer to ensure that justice is done on both sides.

What is unambiguous is that the EAWFD does not in theory alter the HRs obligations of states; to the contrary it clearly states that they are unaffected. Whilst the extended scope of some rights, means there has been positives stemming from the MR program, in particular relating to fair trial rights; the balance to date has leant towards security rather than liberty.

The rights relevant to the implementation of the EAWFD strike at the heart of an individual's autonomy and liberty, these rights include, the right to life (Article 2), the prohibition against torture, cruel and inhuman treatment (Article 3) and the right to liberty (Article 5); the right to a fair trial (Article 6) in relation to a trial that has already occurred or about to occur and any re-trial in relation to trials *in absentia*; the right for respect of family and private life (Article 8) and the effect that the surrender will have on the family and private life of the individual (and related others); and the availability of an effective remedy (Article 13). This list of HRs is not exhaustive; other rights may also come into play depending on the particular circumstances, for example freedom of religion (Article 9) and discrimination (Article 14 and Protocol 12).

These rights, their interpretation, protection, enforcement and relevance to the EAWFD will be considered in greater detail in the following sections.

In order to illustrate the practical impact of the EAWFD on HRs the following sections will consider the manner in which some principles have been stretched to their maximum stress limit, and others beyond their limits leading to deformities, in order to accommodate the EAWFD and in particular MR. Key terms will be considered in the context of relevant rights. For example 'real risk' will be considered in relation to

Article 3 ECHR, ‘flagrant denial’ under Article 6 ECHR and ‘exceptional’ under Article

8. There is of course overlap between the rights and crossover in the usage of terms.

Chapter Five: The Right to Liberty

The right to liberty is set out both in the ECHR (Article 5) and the CFR (Article 6). The focus of is the impact of surrender on these rights; looking at the obligations of the E-MSs and I-MSs with respect to their own internal systems and also the E-MS's extended obligations relating to the I-MS's the internal system.

Provided the arrest is lawful, the deprivation will be justified.²²⁸ Article 5(1) sets out an exhaustive and narrowly interpreted list of exceptions of when the right to liberty can be interfered with; an arrest can be made on the basis of reasonable suspicion,²²⁹ to fulfil an extradition request under one of the other Article 5(1) exceptions. Article 5(1)(f) provides that a person can be deprived of their liberty if done so with a view to their extradition.²³⁰ The ECtHR considers extradition and an EAW as analogous, thus an E-MS can arrest an individual in order to facilitate their surrender. For this arrest to be lawful it has to be in accordance with the law. This provision is not concerned with the lawfulness of the extradition but only of the arrest.²³¹

Article 5(2), 5(3) and 5(4) govern the procedural guarantees which States must provide when depriving a person of their liberty. According to Article 5(2) an arrested person has the right to be “informed promptly in a language he understands, of the reasons for his arrest and any charges against him” in “simple, non-technical language”.²³² This requirement ensures that an individual is able to enforce the right under Article 5(4); Article 5(4) covers the right to challenge the lawfulness of detention. For this reason it is important that they understand the “*essential legal and factual grounds*” for their

²²⁸ If an arrest is not lawful any subsequent detention will also be unlawful.

²²⁹ *Brogan and Others v. UK*, s 11209/84, 11234/84, 11266/84, 11386/85, 29.11.1988

²³⁰ It is interesting to note that once again extradition is put in the same category as deportation which is also governed by this provision.

²³¹ The same test is applied to determine the lawfulness of an arrest as is applied to the lawfulness of detention.

²³² *Fox, Campbell and Hartley* (n682)

arrest. The lawfulness of arrest/detention is to be determined speedily by a court and if not lawful the individual must be released. The right to legal assistance upon arrest is not governed by Article 5 but by Article 6 (right to a fair trial). Article 5(3) covers the right to bail.

The explanatory note provides that Article 6 CFR has the same meaning and scope as Article 5 ECHR and that “the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR”. Thus the interpretation of Article 5 ECHR applies equally to Article 6 CFR; however the ECtHR jurisprudence does not prevent EU MSs from extending the scope and protection offered to individuals, in particular to those involved in cross-border criminal justice proceedings.

5.1 Arrest

Whilst not everyone who is arrested is subsequently detained or imprisoned, arrest nevertheless concerns the deprivation of the person’s liberty. The assessment of this group of rights will focus on the point of arrest by the E-MS on the basis of an EAW issued by another MS.

5.1.1 The Arrest Warrant

Arrest and detention by the I-MS clearly falls under Article 5 and depending on the stated aim could be governed by any of the exceptions under Article 5(1). Under the ECHR, only the Article 5(1)(f) exception applies to an EAW arrest carried out by an E-MS.

In traditional extradition, the I-MS in effect knocks on the door of another State requesting for the wanted person to be handed over. The E-MS engages its own internal mechanism to issue a domestic warrant and to authorise the arrest of the individual before handing them over.

For example, in England and Wales once an extradition request has been certified by the Secretary of State for the Home Office, a district judge then issues an arrest warrant if there are reasonable grounds to believe that the relevant conditions set out under section 71(2) and (3) are met; the offence is an extradition offence and that the evidence would justify the issue of an arrest warrant if the person was accused of the offence within the judge's jurisdiction or convicted within his jurisdiction and unlawfully at large.

This step is missing in EAW proceedings. According to the EAWFD, the arrest by the E-MS is based solely on the EAW pursuant to a domestic arrest warrant issued by the I-MS. There is no need for a second domestic arrest warrant to be issued by the E-MS. An arrest under the authority of an EAW is made in accordance with the law of the E-MS only in so far as set out by the EAWFD implementing law, the ordinary procedural law governing lawful arrest is not engaged. The principle of MR dictates that E-MSs are to execute the arrest warrant as if it were issued by its domestic courts with no further internalising. So with no supporting proof that due process was followed, or that minimum standards were implemented, the E-MS is asked to 'pretend' that the decision went through an equivalent process to that in its own system.

The legal basis of the arrest is the EAW which is itself based on the domestic arrest warrant of the I-MS. In the absence of a harmonized process for the issuance of a domestic arrest warrant or an assurance that minimum standards were met, an EAW should be subjected to similar review as domestic arrest warrants in order to satisfy its lawfulness within the E-MS.

In England and Wales, prior to an arrest being made pursuant to an EAW, SOCA²³³ must review the form and content of the EAW; this is known as an "administrative

²³³ The Serious Organized Crime Agency (SOCA) "came into force on 1st April 2006]...[Its purpose is an intelligence led agency with law enforcement powers, given to it by statute, Serious Organized Crime and Police Act 2005[...][In its capacity SOCA acts as the UK point of contact for Interpol, Europol and

assessment”. If the conditions set out under section 2 EA are satisfied the EAW is 'certified' and passed onto the Police who undertake to locate and arrest the requested person.²³⁴

These are similar requirements for warrants requesting a person to be sentenced or to serve a sentence. This administrative assessment considers the validity of an EAW; in other words whether the correct boxes are ticked and that the prescribed particulars are included and not whether the information contained therein is correct.²³⁵

5.1.2 Lawfulness of the Arrest

The administrative check does not consider substantive issues which may call into question the lawfulness of the I-MS warrant and could merit the non-execution of the EAW. Such issues are not considered by a judge before arrest, since there is no check similar to that under section 71 EA or at the initial hearing which is again administrative in nature (confirming the identity, setting the date for the hearing, asking if the person consents to surrender and determining if the person is to be remanded in custody or bailed). The first opportunity at which a court can consider whether the I-MS's arrest warrant is lawful is during the extradition hearing, at which point the individual's liberty would have been already deprived if held on remand.

Whilst in most cases arguments concerning the lawfulness and arbitrariness of an arrest are usually swallowed up by the arguments against surrender; a court must accept such complaints. Arbitrariness includes acting in bad faith or where an element of deception

Schengen Information System (SIS) and has a Dedicated Fugitives Unit acts as the UK Central Authority for all EAWs.” Theodora Christou, *European Cross Border Justice: A Case Study of the EAW*, The AIRE Centre 2010. Available at: <<http://www.airecentre.org/data/files/resources/11/ECJP-Final-Publication.pdf>> Section 15, Crime and Courts Act 2013 abolishes SOCA and establishes the National Crime Agency.

²³⁴ These procedural requirements relating primarily to the contents of the EAW; which must contain: either a statement stating that the person in question is accused in the I-MS of the commission of a specified offence, that the warrant has been issued for the purposes of arrest and prosecution and also particulars of the person's identity, any other warrant in respect of the offence, the circumstances it is alleged the offence was committed or the sentence imposed.

²³⁵ See *Zakrzewski v The Regional Court in Lodz, Poland*, [2013] UKSC 2 §8

is involved.²³⁶ For example where a MS requests an individual for prosecution, when in reality they are requesting the individual for further investigation or questioning, this could be considered arbitrary since they are not using the EAWFD for the intended purposes. English courts have an inherent right to ensure that the process is not abused for ‘collateral and improper purpose’²³⁷ or to “question statements made in the EAW”.²³⁸ According to Lord Sumption in *Zakrzewski*, this is exceptional and subject to four observations which include looking only at administrative inaccuracies concerning material errors and not factual or evidential challenges of the alleged offence; something reserved for the I-MS.²³⁹

It appears that as a general rule the E-MS will be satisfied as to the lawfulness of the EAW arrest and detention if the EAW is valid in the tick-box sense. Staying faithful to the principle of MR EU national courts are unlikely to conduct such an enquiry. In all likelihood, it will be left to the I-MS courts to rectify, and if they fail to do so it will be ultimately left for the ECtHR to assess. The English courts have made it clear that “under the scheme of the Framework Decision the safeguard against the inappropriate issue of an EAW lies in the process antecedent to the issue of the EAW”,²⁴⁰ and what they receive in an EAW will be taken at face value. This is confirmed by the Supreme Court which states that there are two safeguards, firstly “the mutual trust between states party to the Framework Decision that informs the entire scheme”,²⁴¹ trusting that the I-MS has submitted the truth and secondly the restricted abuse of power check discussed above.

²³⁶ *Bozano v. France*, 9990/82, judgment of 18.12.1986; *Čonka v. Belgium*, no. 51564/99, Judgment 5.02.2002

²³⁷ *Zakrzewski* n235 §11

²³⁸ Per Lord Bingham in *Caldarelli v Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] 1 WLR 1724 §24

²³⁹ *Zakrzewski* n235 §13

²⁴⁰ Per Lord Philips in *Assange v Swedish Prosecution Authority* [2012] UKSC 22, §79

²⁴¹ *Zakrzewski* n235 §10

Nevertheless, the ECtHR is clear that even where a subsequent favourable decision is given, it will not in principle be “sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention”.²⁴² Thus by ignoring potential unlawful arrests and subsequent detention, E-MSs may find themselves before the ECtHR. However where a breach is acknowledged and a remedy is provided by the I-MS upon surrender, it is likely that ‘victim’ status will be lost for the prior unlawful arrest. An ECHR review would assess the “lawfulness” of an EAW arrest with reference to the “lawfulness” of the I-MS’s decision to arrest and the procedural guarantees in place in the E-MS to review the warrant; including the adequacy of relying on the principle of MR as a defence.

Where substantial evidence was presented to the executing national court relating to the unlawful or arbitrary nature of the arrest ordered by the I-MS, the ECtHR could subsequently also hold that the E-MS violated the individual’s right to liberty in executing the unlawful or arbitrary arrest. The violation would not necessarily take place at the time of arrest but at the first court appearance, where an individual challenges the lawfulness of the arrest and subsequent detention.

In *Dabas v High Court of Madrid*²⁴³ the House of Lords considered the UK requirement for an additional certificate from the I-MS certifying that the offence fell within the list of 32 EAW offences not requiring dual criminality. This additional requirement introduced by the EA read in compliance with EU law to mean that it was not mandatory and its absence certainly not fatal, the EAW itself was sufficient certification. Such a requirement would be inconsistent with the EAWFD and

²⁴² *Stephens v Malta (No.1)*, 11956/07, Judgment 21.04.2009, referring also to *Eckle v Germany*, judgment of 15.07.1982, Series A no. 51, p. 32, §§ 69 et seq.

²⁴³ [2007] UKHL 6

“inconsistent with the trust and respect assumed to exist between judicial authorities”.²⁴⁴

Lord Scott dissenting, disagreed that trust is sufficient to ignore an express provision and procedural requirement introduced by Parliament.

Whilst the Court in *Dabas* reached its conclusion mindful of the fact that the introduction of additional requirements would frustrate the EAWFD objectives, this should not be at the expense of the individual. A gap exists in respect of ensuring that the E-MS is not executing an unlawful arrest. A solution could be the harmonization of the domestic process for issuing EAWs which could be achieved by the setting out of minimum standards and requirements. This does not propose the introduction of a requirement to show a *prima facie* case as part of an EAW request, but rather a guarantee that the issuing court has deemed that sufficient information exists for prosecution, similar to the UK requirement under section 1 Magistrates’ Courts Act 1980.

5.2 Detention

Whilst the basis of the arrest is the EAW; once an E-MS executes the arrest it is bound by procedural obligations. For example, Article 5(2) obliges E-MSs to promptly inform the individual of the reasons for their arrest. Article 3 places additional obligations with regards to the conditions of detention which are considered in the next chapter.

These guarantees apply to the I-MS and also the E-MS upon execution of the EAW and when assessing the conditions an individual will face upon surrender in the I-MS.

²⁴⁴ See also the Supreme Court of Cyprus case *David Scattergood* (2005) 1A AAD 142 where a similar issue arose. It was argued that because the basis of his arrest was the EAW law and not the Criminal Procedure Law under which a domestic arrest warrant is needed and thus unlawful. The Court, not surprisingly found that there was no conflict with its EAW implementing law, the Criminal Procedure Law or Article 11 of the Constitution.

5.2.1 Lawful: Necessity and Length of Detention

Article 5 dictates that in order for a detention²⁴⁵ to be lawful²⁴⁶ it must be in accordance with a procedure prescribed by law. Lawfulness is assessed at first instance by the relevant national law²⁴⁷ and then as to whether the law protects the individual from arbitrary detention (or arrest).²⁴⁸ The first test concerns the procedural requirement and the second the substantive.²⁴⁹

There is no general definition of ‘arbitrariness’ set by the ECtHR, instead it has developed case by case. The assessment varies under the different Article 5(1) exceptions. Under (b), (d) and (e) a key factor is whether the detention is necessary to achieve the stated aims and it is only justified as a measure of last resort. This proportionality test requires a balance between the public interest in achieving the objective and the importance of the right to liberty, the length of detention is relevant to the balancing act. Under (a) and (f) arbitrariness is approached differently.

The principle of proportionality is of restricted applicability to arrest and detention under Article 5(1)(f), “any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible”.²⁵⁰ This is the same in extradition proceedings.²⁵¹ The ECtHR has held that as long as the related “action” was being taken with a view to deportation (or extradition); there was no

²⁴⁵ Imprisonment is the most obvious form of detention, however there are other types of detention which may amount to a deprivation of liberty. These have included control orders (*A and others v UK*, 3455/05, [GC] Judgment 19.02.2009), house arrest (*Nikolova v Bulgaria (No 2)*, 40896/98, Judgment 30.09.2004), compulsory treatment in a mental health facility (*Ashingdane v. UK*, 8225/78, Judgment 28.05.1985), being refused authorisation to leave a detention centre (*Cyprus v. Turkey*, 25781/94, Judgment 10.05.2001), being required to reside on a remote island (*Guzzardi v. Italy*, 7367/76, Judgment 6.11.1980).

²⁴⁶ “lawful” has the same meaning under both Articles 5(1) and 5(4). See *Chahal v UK*, 22414/93 [GC] Judgment 11.11.1996

²⁴⁷ See *Lexa v Slovakia*, 54334/00, Judgment 23.09.2008

²⁴⁸ For a definition of “arbitrariness” see *Saadi v UK*, 13229/03, [GC] Judgment 29.01.2008 §§67-74

²⁴⁹ Even in instances where the detention is “in accordance with a procedure prescribed by law”, it may be incompatible with the requirements of Article 5. See *Raza v Bulgaria*, 31465/08, Judgment 11.02.2010.

²⁵⁰ *Chahal* (n246) §113

²⁵¹ *Quinn v France*, 18580/91, Judgment 22.03.1995

requirement that the detention be necessary to prevent the person fleeing or committing a crime. It has not set an absolute detention period pending extradition, although it has set out factors that limit the length. For example it has made it clear that the complexity of international cooperation such as that required in extradition cases will not justify protracted detention.²⁵² The ECtHR is however clear that whilst detention may be lawful under the domestic law, it can at the same time be arbitrary under the ECHR. For a start, detention under Article 5 § 1(f) must be carried out in good faith. The detention has to be closely connected to the grounds for detention relied on by the Government. The detention conditions need to be appropriate and the length of the detention must not exceed what is reasonably required for the purpose pursued.²⁵³

The EAWFD sets a maximum length of detention on remand pending surrender. Article 26 states that the I-MS shall deduct any periods spent on detention arising from the EAW from the total period of detention to be served of a custodial or detention order passed by the I-MS. Where a person is requested to serve a sentence following conviction, care should be taken to ensure that time on remand does not exceed the sentence to be served. If this occurs the detention may cease to be lawful. In practice there is no judicial mechanism to prevent or remedy this. Instead administrative discussions would need to occur for the EAW to be revoked if appropriate.

5.2.2 The Right to Challenge the Lawfulness of Detention

Article 5(4) sets out the procedural guarantees governing the review of pre-trial detention (including bail proceedings). It applies to all grounds for detention under Article 5(1), including detention with a view to extradite.

²⁵² *Scott v Spain*, 21335/93, Judgment 18.12.1996 §83. See also *Sardinas and Alba v Italy*, 56271/00, Judgment 17.02.2005.

²⁵³ See, *Saadi v UK* (n248) §74; and *A and Others* (n245)

Lawfulness of detention is to be determined speedily by a court which has the power to order the individual's release if the detention is deemed unlawful.²⁵⁴ The 'court' must also provide procedural guarantees including: access to relevant documents;²⁵⁵ access to legal assistance to prepare their case; and the ability to participate and be heard either in person or through representation.²⁵⁶ Also applicable is equality of arms guaranteeing equal access to both the case documents and the 'court'. These procedural guarantees are covered under Article 6 ECHR.

At Reasonable Intervals

The right to challenge detention is continuous and an individual must have the opportunity to challenge at reasonable intervals.²⁵⁷ The ECtHR has held that it considers 1 month intervals as reasonable to review detention on remand.²⁵⁸ There are no set time periods established for other forms of detention and it will depend on the circumstances of the individual case.

The EAWFD demands that an EAW "be dealt with and executed as a matter of urgency"²⁵⁹ requiring an individual be brought promptly before a court. Whilst the procedure for reviewing the lawfulness of detention is left to the national laws, MSs are bound by the ECHR standards which require that such a review is speedily undertaken.

Speedily refers to both the speed with which an individual is given the opportunity to challenge their detention before a court and also the time taken for a decision to be

²⁵⁴ Defined as anybody with a judicial character providing the requisite procedural guarantees, this does not include public prosecutors (*Winterwerp v. Netherlands*, 6301/73, 24.10.1979) or government ministers. (*X. v. UK*, 7215/75, 5.11.1981; *Keus v. Netherlands*, 12228/86, 25.10.1990). But does include parole boards provided that the members are independent and impartial and capable of providing procedural guarantees (*Weeks v. UK*, 9787/82, 2.03.1987).

²⁵⁵ *Lamy v. Belgium*, 10444/83, 30.03.1989

²⁵⁶ *Winterwerp* (n254)

²⁵⁷ *X.*, (n254)

²⁵⁸ *Bezicheri v. Italy*, 11400/85, 25.10.1989

²⁵⁹ Article 17(1)

made. In assessing promptness, the ECtHR has not set any absolute limits;²⁶⁰ factors which will be considered include whether the authorities acted diligently, as well as the conduct of the detainee in particular if they contributed to any delay.²⁶¹

The first opportunity for an executing national court to review the lawfulness of detention is in most cases the EAW hearing. Once the individual has been surrendered, the obligation to review the lawfulness of continued detention switches to the I-MS.²⁶² If a court determines a detention to be unlawful, the individual must be promptly released.

5.3 Bail

In addition to the right to challenge the lawfulness of continued detention, an individual also has a right to bail.²⁶³ Article 5(3) sets the presumption in favour of bail and establishes the procedural requirements of Article 5 as applicable to situations provided for under Article 5(1)(c), namely to bring an arrested individual before a competent court.

In terms of the E-MS, this section does not explicitly apply to extradition proceedings.²⁶⁴ However it is arguably that it applies to EAW proceedings.

First, whilst initially the obligation to consider “less severe measures” to detention is not found in Article 5(1)(f), a string of recent ECtHR decisions have applied the requirement with a view to deportation or to prevent an unlawful entry.²⁶⁵ This interpretation could also be applied to situations where a person is detained with a view

²⁶⁰ *Sanchez-Reisse v. Switzerland*, 9862/82, Judgment 21.10.1986

²⁶¹ *Luberti v. Italy*, 9019/80, Judgment 23.02.1984

²⁶² Whilst post-trial detention will be relevant in some cases, it is beyond the scope of this work and will not be assessed.

²⁶³ *Caballero v. UK*, 32819/96, Judgment 8.02.2000

²⁶⁴ *Lynas v Switzerland*, 7317/75, Commission Decision 6.10.1976.

²⁶⁵ *Yoh-Ekale Mwanje v. Belgium*, 10486/10, Judgment 20.12.2011, *Čonka v Belgium* (n236), *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, 13178/03, Judgment 12.10.2006, *Riad and Idiab v Belgium*, s 29787/03 and 29810/03, Judgment 24.01.2008, *Muskhadzhiyeva and Others v Belgium*, 41442/07, Judgment 19.01.2010, *M.S.S. v Belgium and Greece*, 30696/09, Judgment 21.01.2011 and *Kanagaratnam and Others v Belgium*, 15297/09, Judgment 13.12.2011

to surrender them. Whilst the text of Article 5(1)(f) states that it is not required to show that detention is necessary, but detention cannot exceed what is reasonably required to achieve the objective.

Detaining a person on the sole basis that they are to be surrendered could also be regarded as arbitrary if no other reason exists and no consideration is given to alternatives. This could be particularly poignant where dependants are involved or where the proceedings are protracted because an appeal is pending. An argument can be made on this basis for bail to be granted when reviewing the lawfulness of the detention.

Second, as set out above, an individual is arrested on the basis of the EAW from the I-MS and not on the basis of a domestic arrest warrant issued by the E-MS. The E-MS law only regulates the implementation of the EAWFD and not the basis of a decision to arrest. The domestic law provides the legal basis for the execution of the EAW. The legal basis for the issuance of the warrant stems from the I-MS law and procedure. If the legal basis of an arrest is deemed to be the I-MS's arrest warrant, it can be argued that it is not the Article 5(1)(f) exception which applies to EAW arrests, but either Article 5 (1)(b)²⁶⁶ when requested for the fulfillment of a legal obligation or Article 5 (1)(c)²⁶⁷ when requested for the purposes of being prosecuted.

The availability of bail for those arrested pursuant to an EAW is foreseen by the EAWFD, under section 12 EAWFD, keeping an individual arrested under an EAW in detention is optional and to be governed by the national law. It states that the "person may be released provisionally at any time in conformity with the domestic law of the

²⁶⁶ The lawful arrest or detention of a person for non-compliance with the lawful order of a court (to pay a fine, to go to prison when requested to in countries such as Poland who operate a waiting list to serve sentences) or in order to secure the fulfilment of any obligation prescribed by law.

²⁶⁷ The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. In other words when a person is requested for prosecution.

executing Member State”. The EAWFD thus foresees the possibility of bail being granted by the E-MS in EAW proceedings. In the UK the implementing law provides that the District Judge at the initial hearing is to determine whether to remand the individual in custody or release them on bail.²⁶⁸ Further, the requirement to review the lawfulness of detention under Article 5(4), indirectly imposes an obligation to grant bail where appropriate.

Arguably under ECtHR jurisprudence, taken together with the integration of criminal justice systems. The space has been provided by the EU law for MS to extend Article 5(3) to cover the EAW. However since it is up to individual MS to determine, there is disparity across MSs.

The focus of the next segment will look at the obligations of the I-MS and by extension the extended jurisdiction of the E-MS; mindful of its probable application to the E-MS.

Detention is authorised under Article 5(1)(c) only if in addition to other grounds justifying detention,²⁶⁹ there is a reasonable suspicion that the individual may have committed the offence.²⁷⁰ An EAW can only be issued for the purposes of prosecution and not investigation. But at the same time the presumption of innocence is respected and that a judicial decision on bail does not reflect an opinion of guilt.²⁷¹

5.3.1 Grounds for Refusal

ECHR jurisprudence is clear that pre-trial detention does not automatically follow an arrest and that the choice for the courts is not between providing a trial within a

²⁶⁸ The EA was amended by the Policing and Crime Act 2009 (c. 26), ss. 77(3), 116; S.I. 2009/3096, art. 3(t), inserting section 6(5A)(5B) on 25.1.2010 clearly stating that the judge has the power to grant bail in EAW surrender proceedings. “(5B) *The judge must remand the person in custody or on bail (subject to subsection (6)).*”

²⁶⁹ *Hibbert v Netherlands*, 38087/97, Judgment 26.01.1999

²⁷⁰ *Labita v Italy*, 26772/95, Judgment 6.04.2000 §155

²⁷¹ *Barbera, Messegue and Jabardo v Spain*, 10590/83, Judgment 6.12.1988 §91. See also *Caballero* (n263) the UK accepted that a prohibition against the release on bail of an individual, of the offence charged with was of the same nature as a different offence he had been convicted of previously, was a violation of Article 5(3).

reasonable time and granting release.²⁷² Article 5(3) requires the reasoning of the court to be detailed and specific to the individual.²⁷³ In *Smirnova* it was held that the procedural requirement to provide specific justifications was not met, where there was reference to the individual's 'character' without detailing any what aspect of the character or why it justified further detention. In *Nerattini v. Greece*,²⁷⁴ the ECtHR noted that the "risk of absconding was just mentioned laconically without being related to the specific circumstances of the case." Any decision to continue detention needs to be both reasoned and justified in the circumstances.

The seriousness of the charge cannot be the sole or decisive factor,²⁷⁵ and the ECtHR has identified reasons for which bail may be refused. These include: where there is a risk the individual will flee ("the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted");²⁷⁶ where the individual may interfere with the course of justice (destroying evidence, collusion with other suspects or intimidation of witnesses);²⁷⁷ to prevent the commission of an offence;²⁷⁸ or to maintain public order (this also covers the reaction of third parties to the individual's release). For all grounds, evidence has to be presented proving the real risk. With the passage of time or it will be harder to justify continued detention or the previous reasons may cease to exist.²⁷⁹

Despite this clear guidance, bail remains an issue across the EU. An example of the difficulties encountered by foreign nationals to get bail is the case of Andrew Symeou.

²⁷² *Wemhoff v. Germany*, 2122/64, Judgment 27.06.1968

²⁷³ *Smirnova v Russia*, 46133/99, Judgment 24.07.2003 §§68, 70. See also *Trzaska v Poland* (25792/94, Judgment 11.07.2000) where the risk of offending was not explained or expressly referred to. In both cases the ECtHR accepted that detention might have been justified, but nevertheless found a violation of Article 5(1)(c).

²⁷⁴ 43529/07, 18.12.2008

²⁷⁵ *Hristova v. Bulgaria*, 60859/00, Judgment 7.12.2006

²⁷⁶ *Neumeister v. Austria*, 1936/63, 27.06.1968; *Letellier v. France*, 12369/86, Judgment 26.06.1991

²⁷⁷ *Wemhoff* (n272); *Ringeisen v Austria*, 2614/65, Judgment 16.07.1971; *Clooth v. Belgium*, 12718/87, Judgment 12.12.1991

²⁷⁸ *Hristova* (n275)

²⁷⁹ *Jecius v Lithuania*, 34578/97, Judgment 31.07.2000; *Kudla v Poland*, 30210/96, Grand Chamber Judgment 26.10.2000.

Upon surrender by the UK to Greece, Andrew was denied bail despite having complied with every requirement imposed on him by the UK authorities whilst his surrender decision was pending. The main reasons given by the Greek court for refusing bail was that as a non-national he was a flight risk. The Zakynthos Council of Magistrates determination, Number 66/2009, of Symeou's appeal against the denial of bail, the court refused the appeal on the following grounds, 'in addition to the strong evidence of his guilt in respect of the felonious act imputed to him, the accused is not a Greek citizen, has no known residence in the country and it is highly likely that were he to be released he would abscond abroad' ²⁸⁰

5.3.2 Alternatives

According to Article 5(3), "the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative means of ensuring appearance" and only when "other, less severe measures have been considered and found insufficient" can detention be imposed. ²⁸¹

Article 14 ECHR prohibits discrimination; courts are thus prohibited from detaining an individual solely on their status as a non-national. Whilst it may appear that non-nationals present a greater risk of absconding this alone is not sufficient to justify treating them differently to their own nationals. In the context of the EAW, EU law provides further protection against discrimination and specifically on the basis of nationality. ²⁸² Courts have the option to attach conditions to bail including seizing travel documents, ²⁸³ making the use of alternatives more viable and harder to dismiss. The

Symeou example is emblematic of cases across Europe where bail is denied because

²⁸⁰ Unofficial translation by author of the original Greek text: 'περαιτέρω, πέραν των σοβαρών ενδείξεων ενοχής του για την αποδιδόμενη σε αυτόν κακουργηματικής φύσεως πράξη, ο κατηγορούμενος δεν είναι Έλληνας υπήκοος, δεν έχει γνωστή διαμονή στη χώρα και είναι πολύ πιθανό αν αφεθεί ελεύθερος, να διαφύγει στο εξωτερικό'.

²⁸¹ *Jablonski v Poland*, 33492/96, Judgment 21.12.2000 §83

²⁸² Article 12 EU Treaty and Article 21 CFR.

²⁸³ These guarantees are authorised by Article 5(3). See *Dermanovic v Serbia*, 4897/06, Judgment 23.02.2010)

authorities rely on the assumption that as non-nationals they lack ties to the country and are therefore more likely to abscond.²⁸⁴

The validity of assertions that an EU citizen should not be granted bail because of the risk of absconding is dubious given the MR measures that have been adopted. The EAW procedure has proven to be a fast and effective way of securing the attendance of individuals at trial, so even if they flee, an EAW can be re-issued.

European Supervisory Order

Pre-trial detention is an exceptional measure and subject to both necessity and proportionality tests.²⁸⁵ The European Supervisory Order Framework Decision (ESOFD)²⁸⁶ acts as a useful flanking measure for the EAWFD and the MR programme generally.

The ESO provides another alternative to surrender during pre-trial stages which can be less intrusive. It contains similar provisions to those found in the EAWFD, the Council of Europe Convention on the Transfer of Sentenced Persons and the EU FD 2008/909/JHA.²⁸⁷

An aim of the ESO is to enhance the right to liberty and presumption of innocence in the EU and to minimise the risk that non-residents will be remanded in custody pending trial.²⁸⁸ By enabling MSs to undertake to impose and supervise orders issued by other MSs including requirements such as surrendering a passport or reporting to a police

²⁸⁴ For example in *Symeou*, his mother's uncle lived in Athens where he had said he would undertake to stay.

²⁸⁵ In addition to the case law set out above see the European Parliament resolution *on detention conditions in the EU* of the 15.12.2011 (2011/2897(RSP))

²⁸⁶ Council Framework Decision 2009/829/JHA of 23 October 2009 *on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention*, OJ L 294 of 11.11.2009 (ESOFD). It entered into force 1.12.2009; and Member States had until 1.12.2012 to implement.

²⁸⁷ Council Framework Decision 2008/909/JHA of 27 November 2008 *on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union*, OJ L 327, 5.12.2008

²⁸⁸ ESOFD (n286), Recitals 4 and 5.

station periodically, the ESO in effect removes an obstacle to surrender. A viable alternative to detention on remand of EAW requested individuals becomes release on bail with the option of being supervised by the authorities of the MS of residence or nationality. This satisfies the Article 5 proportionality test if an individual will not be subjected to a year on remand in custody, but rather surrender is deferred until the I-MS is trial ready. In the meantime, the E-MS supervises the individual subject to the conditions set out by the I-MS. This enables an individual to continue working and reduces the separation time from his family; it also reinforces the presumption of innocence which would otherwise be weakened by many months in pre-trial detention.

The ESO serves both the interests of the MSs and those of the individual who can continue their life in their country of residence whilst awaiting trial, instead of being held on remand in a foreign prison.²⁸⁹

5.4 Executing State Obligations Under Application of Article 5

The EAWFD does not contain an express obligation on E-MSs to ensure that detention upon surrender will be in accordance with Article 5. As with other HRs this obligation is implicit and stems from the EU Treaty, its general principles, the obligation to implement the EAWFD in compatibility with HRs and the extended reach of the ECHR and of the CFR.

The test in relation to Article 5 is whether there will be a flagrant denial, in other words will Article 5 be nullified by the acts of the I-MS upon surrender. It requires MSs to satisfy themselves that Article 5 rights will be respected in the I-MSs. When an E-MS is determining whether to surrender an individual, thought should also be given to the conditions that that individual will face upon return. MSs are under an obligation to not expose individuals under their jurisdiction to irremediable situations, including outside

²⁸⁹ It is unfortunate that the UK has chosen to not implement the ESOFD. It would appear that they are awaiting their decision whether to exercise their opt-out by 2014.

their jurisdiction.²⁹⁰ These should include consideration of whether the right to bail is likely to be arbitrarily denied by the I-MSs, the intervals between review of detention and whether the period of time in pre-trial detention would be proportionate. Where there is evidence that there will be a “flagrant denial” of Article 5, there is a positive obligation to refuse extradition (and by analogy surrender).²⁹¹

The principle of MR requests judicial authorities to trust that upon surrender the individual’s rights under Article 5 will be respected. MS practice and the jurisprudence of the ECtHR paint a different picture. In 2010 and 2011 the ECtHR found a violation of Article 5(1)(c) and 5(3) in numerous cases against EU MSs.²⁹² These cases concerned the duration of pre-trial detention, not being brought promptly before a court to verify the lawfulness of their detention and the lack of reasoning for the decision to continue detention. These cases provide only a snapshot of the reality in MSs, and would indicate that the trust should and can be displaced.

Where evidence exists of practice contrary to Article 5, the E-MS is under an obligation to ensure that the individual is not exposed to such a process. The evidence required will normally be high and need to show that the individual themselves will be subjected to the specific process. However the burden is not entirely on the individual and a state must make use of the resources available to it to satisfy themselves that the risk does not

²⁹⁰ *Kirkwood v UK*, 10479/83, Decision 12.03.1984

²⁹¹ *Drozd* (n567)

²⁹² See for example: *Petkov v. Bulgaria* (32130/03, judgment 7.01.2010); *Wegera v. Poland*, (141/07, judgment 19.01.2010); *Scundeanu v. Romania* (10193/02, judgment 2.02.2010); *Malkov v. Estonia* (31407/07, judgment 4.02.2010); *Jiga v. Romania* (14352/04, judgment 16.03.2010); *Tănăsescu v. Romania* (25842/03, judgment 6.07.2010); *Bujac v. Romania* (37217/03, judgment 2.11.2010); *Moulin v. France* (37104/06, judgment 23.11.2010); *Svetoslav Hirstov v. Bulgaria* (36794/03, judgment 13.01.2011); *Haidn v. Germany* (6587/04, judgment 13.01.2011); *Schummer v. Germany (No.1)* (27360/04 ; 42225/07, judgment 13.01.2011); *Crabtree v. The Czech Republic* (41116/04, judgment 25.02.2010); *Jendrowiak v. Germany* (30060/04, judgment 14.04.2011); *Gasins v. Latvia* (69458/01, judgment 19.04.2011); *Boguslaw Krawczak v. Poland* (24205/06, judgment 31.05.2011); *Miroslaw Garlicki v. Poland* (36921/07, judgment 14.06.2011); *Nicut- Tănăsescu v. Romania* (25842/03, judgment 6.07.2010); *Degeratu v. Romania* (35104/02, judgment 6.07.2010); *Bruncko v. Slovakia* (33937/06, judgment 3.11.2011); *O.H. v. Germany* (4646/08, judgment 24.11.2011).

exist. It is clear that where the breach is systematic, the E-MS will have difficulty justifying the surrender.

Where evidence is provided to the E-MS showing a practice by the I-MS of laconically referring to the risk of absconding or any other ground, in particular ones related to the individual's non-national status, it is clear that the E-MS is on notice that the individual's Article 5 right to bail will be violated. It should then act accordingly to avoid being complicit in the violation. This can be done by obtaining assurances or by applying the ESO until the I-MS is trial ready.

E-MSs should not be surrendering individuals to MSs where there is a proven discriminatory practice of not granting bail to non-nationals. Such practice would be in violation of Article 5 and as such the E-MSs could also be held liable under the *Soering* principle.

5.4.1 To Conclude

The governing procedural law for the decision to issue an arrest warrant is that of the I-MS. The presumption that this decision is not arbitrary is rebuttable and subject to a review of compatibility with HRs standards by the E-MS, but not until the first surrender hearing and will need to meet high thresholds.

Whether an arrest is lawful under the ECHR is primarily the decision of the I-MS. However the E-MS's decision to implement an EAW detention will also be deemed unlawful if at the time they ought to have known (or if evidence was presented showing) that the I-MS decision to issue the warrant was contrary to Article 5.

There is an obligation for the I-MS upon surrender to review at regular intervals the lawfulness of detention. There is however a double obligation for the E-MS. When assessing the lawfulness and arbitrariness of detention or continued detention for the

purposes of surrendering an individual, the E-MS need not show that the detention is necessary. However, the requirement for the length of detention must not exceed what is reasonably required for the purpose pursued, this together with recent ECHR cases relating to asylum law, illustrate a different trend which in effect requires states to show that detention is necessary. They must also be satisfied that such regular reviews will be conducted by the I-MS.

In challenging the lawfulness of detention, the individual is likely to request bail. Denial of bail must be supported by sound and individualized reasons which are not laconically or discriminatorily applied. The duty to consider alternatives to detention applies to both the I-MS and E-MSs; with the E-MS once again having a dual responsibility to also ensure that bail will not be arbitrarily denied by the I-MS.

The lawfulness of the arrest appears to be primarily a matter of the I-MS's domestic law and governed in the E-MS by the mutual trust presumption. Nevertheless there are procedural obligations for the E-MS regulating the lawfulness of the detention which follows arrest, in particular the detention's necessity, length and speedy review. E-MSs are relying on a presumption that the domestic arrest warrant and the EAW are not arbitrary and have been issued procedurally in accordance to the law; the governing procedural law being that of the I-MS.

In EAW proceedings the I-MS does not knock, it reaches into the territory of the E-MS and engages the authorities to collect the wanted individual. However the due process standards applied when reviewing the lawfulness of an EAW arrest should be those of the E-MS, which are of course assumed to correlate with those of all EU MSs. Thus the lawfulness of an EAW arrest must be capable of review by the courts taking into account the I-MS's decision to issue the EAW, and going beyond the purely procedural

conditions of for example section 2 EA. The presumption of lawfulness must be rebuttable on presentation of sufficient evidence.

Whilst bail is essentially an issue for the I-MS; the E-MS retains responsibility to review and refuse surrender if arbitrary deprivation of bail is a foreseeable consequence of the surrender, otherwise the E-MS is likely to be held complicit in the violation.

Article 5(3) is arguably also applicable to the E-MS. If it is agreed that the legal basis of the arrest is the arrest warrant of the I-MS, then the EAW arrest by the E-MS is different to an arrest under traditional extradition. It is part of the I-MS's arsenal of tools to secure the trial of individuals, an 'extraterritorial' extension of their domestic proceedings and should be assessed accordingly. This argument is further bolstered by Article 12 EAWFD which foresees release on bail and whilst optional and governed by national laws, the UK gives the power to a District Judge to release a person on bail.

This means that the Article 5(3) guarantees apply to both E-MS and I-MS detention with a presumption in favour of bail also existing pending surrender. There are two considerations on this point. As time passes, for example if extensions have been granted by the court or if petitions to appeal are granted, the case for bail will strengthen. As the length of detention on remand grows, the grounds for refusing bail also need to strengthen in order to justify continued detention.

Under Article 5(4), both the I-MS and E-MSs' procedures, must fulfill the specified procedural guarantees in respects to the review of pre-trial detention. Such reviews must be held at reasonable and regular intervals, providing a speedy decision and the court hearing the review must have the power to release an individual if their detention is deemed unlawful. Whilst Article 5(4) does not make explicit reference to release on bail, in practice it may be unlawful to continue detaining an individual, with release on bail the compromise between detention and release.

In addition to its own internal system, the E-MS also has obligations with respect to the standards in the I-MS. There are thus clear obligations for the I-MS under Article 5 and whilst it may initially appear that these procedural guarantees do not all apply to the E-MS EAW proceedings (in particular the right to bail), further consideration shows that the scope has been expanded to encompass these proceedings.

Chapter Six: Prohibited Treatment

The prohibition against torture, inhuman and degrading treatment and punishment is found under Article 3 ECHR and Article 4 CFR. The Explanatory Text to the CFR states that the meaning and scope is the same as Article 3.²⁹³ The prohibition is an absolute right²⁹⁴ and a peremptory norm of international law.²⁹⁵ Neither the principle of proportionality nor the margin of appreciation are applicable, there is no balancing act to be conducted between the interests of the individual and of the community, including when combating terrorism and organised crime.²⁹⁶

Although the provision is framed in negative terms, Article 3 also creates positive obligations on States. These procedural obligations are: to have in place measures which effectively protect individuals within their jurisdiction from being subjected to the prohibited treatment, including taking pre-emptive action,²⁹⁷ and to conduct an effective investigation into allegations capable of identifying and punishing the perpetrators.²⁹⁸ It is irrelevant whether state authorities or private actors are responsible for the prohibited treatment.²⁹⁹

²⁹³ The focus of this section will be on the ECHR and by extension the CFR; however there are a number of other instruments relevant to the issues and to the EAW. These include: European Convention for the Prevention of Torture (which established the CPT), a series of Council of Europe Committee of Ministers recommendations (Recommendation (2006)2 on European Prison Rules and Recommendation (2006)13 on the use of remand in custody), Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7), the UN Convention against Torture (CAT) and its Optional Protocol.

²⁹⁴ *Labita v Italy*, 26772/95, Judgment 6.04.2000

²⁹⁵ *Al-Adsani v UK*, 35763/97, Judgment 21.11.2001

²⁹⁶ *Chahal* (n246) A position reconfirmed in *Saadi v Italy* (37201/06, [GC] Judgment 28.02.2003 §139) where the ECtHR stated that it “*considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived ...The prospect that he may pose a serious threat to the community if not returned does not in any way reduce in any way the degree of risk of ill treatment that the person may be subject to on return.*”

²⁹⁷ *X v UK*, 29392/95, Judgment 10.05.2001

²⁹⁸ *Assenov v Bulgaria*, 24760/94, Judgment 28.10.1998

²⁹⁹ *A v UK*, 25599/94, Judgment 23 .09.1998 §22

In relation to the EAWFD and MR measures, this Article creates obligations for both the executing and I-MSs. They both have to ensure that a person detained within their jurisdiction is not subjected to Article 3 prohibited treatment. Additionally, the E-MS also has to ensure that they are not surrendering an individual to a destination state where conditions or treatment may engage Article 3. There have been a sizeable number of violations found by the ECtHR with a significant number against EU MSs. Thus the vast majority of cases referred to as setting out the minimum standards are not only recent but also include cases against EU MSs, illustrating that it is a live issue which needs to be taken into account when surrendering individuals.

The ECtHR jurisprudence has established a rigorous framework for assessing conditions and treatment. The interstate case of *Ireland v UK*,³⁰⁰ sets out the definition of the different levels of treatment prohibited under Article 3. Torture is defined as “deliberate, inhuman treatment causing very serious and cruel suffering”. Inhuman treatment or punishment is “intense mental or physical suffering”, including where it has been premeditated, applied over a long period of time, and causes bodily injury.³⁰¹ Degrading is treatment or punishment which causes humiliation rooted in fear, anguish, and inferiority; whether the intention was to humiliate or debase an individual is another important element to consider, although in the absence of an affirmative intention a violation may still exist.³⁰² It is primarily concerned with the mental suffering and the diminishment of human dignity.³⁰³ Treatment will need to meet the established severity threshold and is determined subjectively taking the following factors into account “the nature and context of the treatment, the manner and method of its execution, its duration, its mental and physical effects and, in some instances the sex, age, and state of health of the victim”.

³⁰⁰ *Ireland v. UK*, 5310/71, Judgment 18.01.1978 §167

³⁰¹ See also *Kudla* (n279)

³⁰² See *Van der Ven v. the Netherlands*, 50901/99, Judgment 4.02.2003 §48

³⁰³ see *Kalashnikov v. Russia*, 47095/99, Judgment 15.07.2002

6.1 Negative and Positive Obligations

6.1.1 Arrest Treatment

The negative obligation of Article 3 is exemplified when considering the treatment of an individual when arrested; under an EAW, the E-MS has to do so in conformity with Article 3. Article 3 prohibits the use of force when it reaches the set severity thresholds, so since some use of force is permitted, in particular when carrying out legitimate state functions such as an arrest;³⁰⁴ a violation will not be found whenever injury is inflicted upon an individual by the arresting officers, if it “was strictly necessary by his own conduct”.³⁰⁵ The case of *Douglas-Williams*³⁰⁶ provides a controversial example of legitimate force in the UK. In this case police had been attempting to arrest the victim when he threatened them with a kitchen knife, he was first hit with a police baton before being placed in the controversial prone position,³⁰⁷ handcuffed and placed in the police van. At the police station, whilst the custody officer was being informed of the circumstances, he was in the prone position. Having been removed to a cell he was strip-searched in the prone position for part of the search and on his back with his handcuffs removed for the later part having complained of breathing difficulties. He was then put under constant supervision and a medical officer was called to examine the injuries of both the victim and the officers. He died an hour after his arrest, the inquest found positional asphyxia as one cause of death returning a verdict of accidental death, this was endorsed by the Court of Appeal.³⁰⁸ The ECtHR found that the force used was

³⁰⁴ In addition to the point of arrest (or soon after), ill-treatment can also occur during police questioning and in police custody. In *Selmouni v France*, (25803/94, Judgment 28.07.1999), over several days the applicant was subjected to prolonged abuse by officers including being dragged by his hair, urinated over, threatened with a syringe and blowlamp and being beaten.

³⁰⁵ *Ribitsch v Austria*, 18896/91, Judgment 4.12.1995 §38

³⁰⁶ *Douglas-Williams v UK*, 56413/00, Admissibility Decision 8.01.2008

³⁰⁷ In this position the individual is placed on his front with his hands restrained behind his back. Whilst an authorised police (and mental health care) restraint method there have been a number of deaths linked to its use and inquest findings in the UK.

³⁰⁸ The Police Complaints Authority also found no abuse of authority by using neither unnecessary violence nor neglect on the part of the officers. Following this case, police training on the use of the prone

proportionate, not excessive and justified on the basis of the victims own acts. In contrast in *Rehbock v Slovenia*,³⁰⁹ where an unarmed man sustained a fractured jaw during an un-resisted arrest, the ECtHR found a violation.

6.1.2 Medical Treatment

In another case against the UK, the ECtHR also considered the positive obligation to provide appropriate medical treatment, the lack of which may amount to a violation.³¹⁰ The case of *Keenan*³¹¹ concerns a death in custody, where it was held that the UK had failed to provide adequately informed treatment to the applicant's son who was a known suicide risk. Just because an individual is being arrested pursuant to an EAW and not a domestic arrest warrant, this does not absolve the E-MS from their ECHR obligations to ensure that the rights of individuals in their custody are respected.

These obligations are also relevant for I-MSs who need to have confidence in the criminal justice system of the E-MS. To ensure that HRs are protected at all stages, it is important that the arresting police across the EU all abide by the minimum standards and safeguard the integrity of the individual.

6.2 Detention

The HRs obligations of the E-MS do not end upon surrender. The extended reach of the ECHR means that even where HRs violations occur in the I-MS after surrender, the E-MS may also be held liable by virtue of their act in surrendering the individual to that situation. In addition to the treatment upon arrest, MSs must be mindful of detention conditions.

position was extended from 2 hours to 2 days and includes coverage of the risks and how to minimise them.

³⁰⁹ 29462/95, Judgment 28.11.2000

³¹⁰ See *Kudla* (n279)

³¹¹ *Keenan v UK*, 27229/95, Judgment 3.04.2001

6.2.1 Prison Conditions

Prison conditions are an example of where lawful acts of State agents can result in treatment contrary to Article 3. One aspect of detention conditions which the ECtHR has considered is allocation of cell space. In *Orchowski v. Poland*,³¹² the Court stated that “extreme lack of space weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were ‘degrading’.”³¹³ In this case, the ECtHR took into account the guidelines of the CPT which require at least 7 m² per prisoner, in *Orchowski* the applicant had suffered a violation of Article 3 having been detained in a space of less than 2m² per person. Although the application was filed in May 2004, the Court examined prison conditions extending until the date of its judgment in 2009. The Court found evidence of conditions that portrayed ongoing violations of Article 3 and based its decision with regard to the general statistics produced by the Polish prison service authorities. These statistics revealed that, even though the government and the applicant disagreed about certain facts surrounding the applicant’s detention, such as allocation of space, “the official general statistics, confirmed by the Government, that the rate of overcrowding in Polish prisons and remand centres was still at 8.1% in September 2008 and at 4% in June 2009.”³¹⁴

In the UK following *Orchowski*, a plethora of cases argued, with no success, that to surrender them to Poland and other states would be in violation of Article 3 because they would be subjected to overcrowded prisons. The courts adopted a strict reading of their obligations under the EAW and also of the high threshold that had to be reached.³¹⁵ Ominously, in the case of *Balasevics*, the court held that the prison

³¹² 17885/04, Judgment 22.10.2009 § 122

³¹³ *Karalevičius v. Lithuania*, 53254/99, Judgment 7.04.2005

³¹⁴ *Orchowski v. Poland*, 17885/04 Judgment 22.10.2009 §130

³¹⁵ There are numerous cases on this point, see for example *R. (on the application of Brand) v Poland* [2012] EWHC 379 (Admin)

conditions described were not unique to Latvia and similar issues would be encountered in the UK.³¹⁶ Here the mutual trust appears to be that HRs respect equally fall short.

Relying on MR, in *Klimas*³¹⁷ the Court dismissed the appeal stating that only in ‘exceptional circumstances’ did the court need to examine allegations about prison conditions in Category 1 countries.³¹⁸

Where lack of space is not an issue on its own, other factors may be taken into account which together give rise to a violation. This includes aspects of the detention environment including sanitary conditions, sleeping arrangements, access to fresh air and natural light and length of detention. One such factor may be the length of time spent in detention. For example, in the case of *Alver v Estonia*,³¹⁹ the fact that the applicant was held for three years and seven months in crowded and unsanitary conditions contributed substantially to the ECtHR’s assessment of the violation.

In *Peers v Greece*,³²⁰ in addition to detention in a small cell, other restrictions and conditions lead the ECtHR to find a violation of Article 3. In addition to being confined to his bed due to the lack of space in the segregation wing cell, it was also extremely hot with no ventilation and no privacy to use the toilet. Despite being aware of these conditions, the authorities took no steps to remedy or improve them, an omission the ECtHR found to imply a lack of respect for the applicant.

The ECtHR has also found violations of Article 3 as a result of the cumulative effect of harsh conditions over time, which in themselves may not amount to a violation of Article 3. The ECtHR will consider whether the accumulation of harsh conditions may

³¹⁶ *Balsevics v Latvia* [2012] EWHC 813 (Admin)

³¹⁷ *R. (on the application of Klimas) v Lithuania* [2010] EWHC 2076 (Admin)

³¹⁸ In doing so the Judge relied on the admissibility decision by the ECtHR in *K.R.S. v UK* (32733/08, Decision 2.12.2008). This case concerned removals to Greece under the Dublin II Convention which has been subsequently superseded by the *M.S.S. v Belgium*.

³¹⁹ 64812/01, Judgment 8.11.2005

³²⁰ 28524/95, Judgment 19.04.2001

have severely detrimental effects on the applicant. In *Dougoz v Greece*,³²¹ the occupancy levels were “grossly excessive”, the detainees did not have beds, there was no hot water, no natural light, and no chance for exercise or nutritious food. The ECtHR held that the cumulative effect of these conditions amounted to degrading treatment.

In addition to the case law of the ECtHR, the reports of both the CPT and of the UN Committee Against Torture (CAT) shed further light on the real risk of individuals being surrendered to situations, and in particular detention, contrary to Article 3.

In 2009, the CPT visit to Latvia³²² revealed persistent ill-treatment of prisoners by prison officials. One prisoner had died in his cell due to excessive force from prison guards. In addition, the Committee found that prisoners were held in cramped conditions (200m² between 60-70 prisoners). The prisoners had no natural light, no hot water, and only had access to showers once a week. Opportunities for exercise were limited to activities in concrete cubicles. Access to health care was extremely limited: one psychiatrist and one physician were on site for 25% of the time and prisoners had to pay for non-emergency care. It is interesting to note that the UK Courts did not find the report sufficient to displace the lower court’s finding that Mr Valts would have access to adequate health care upon surrender.³²³ Mr Valts was diagnosed with HIV and Hepatitis C. The UK Court accepted that the CPT report showed a number of major shortcomings (in Riga Central Prison out of 170 prisoners with HIV only 10 were receiving anti-retroviral drugs) which were counter to the information provided by Latvia. Despite this the UK Courts did not consider that the overall picture was “one of seriously deficient health care for prisoners”.

³²¹ 40907/98, Judgment 6.03.2001

³²² CPT, *Report to the Latvian Government on the visit to Latvia carried out by the CPT from 3 to 8 December 2009*, CPT/Inf (2011) 22

³²³ *Valts v Latvia* [2010] ECHC 999 (Admin)

In 2008, the CPT visited Bulgaria³²⁴ where it found evidence of extreme prison overcrowding (7 prisoners in a cell measuring 15m² and 14 prisoners in a cell of 40m²). It further found particularly harsh conditions and regimes for prisoners serving life sentences. These conditions included prolonged handcuffing and lack of exposure to the outside.

In 2009, the CPT reported³²⁵ overcrowding and inadequate facilities in Greek prisons. The Committee found instances of 3 or 4 people sharing a single cell; one prison with a capacity for 80 had 217 inmates. Prisoners were sharing beds or sleeping on the floor and the mattresses were infested with cockroaches. Hygiene was lacking, the toilets were not working and no health care was offered.

In Poland, the CPT found in 2009 that individuals arrested under suspicion of committing crimes experienced excessive force by police during questioning. The CPT commented that it was of “such severity that it could well be considered as amounting to torture”.³²⁶ This treatment included blows to the soles of the feet and electric shocks to the genitals. Furthermore, the CPT found that disciplinary actions brought against the officers for the abuse were conducted by colleagues within the police establishment rather than by independent authority. In the prisons, the CPT found evidence of overcrowding and lack of adequate hygiene, including at one institution no possibility of a shower. The CPT found a total lack of provision for activities for prisoners held on remand, which rendered the experience “more punitive than the regime for sentenced persons... oppressive and stultifying”.

³²⁴ CPT, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the CPT from 15 to 19 December 2008*, CPT/Inf (2010) 29

³²⁵ CPT, *Report to the Government of Greece on the visit to Greece carried out by the CPT from 17 to 29 September 2009*, CPT/Inf (2010) 33

³²⁶ CPT, *Report to the Polish Government on the visit to Poland carried out by the CPT from 26 November to 8 December 2009*, CPT/Inf (2011) 20,12

In addition to the work of the CPT in this field, the work of CAT also considers detention conditions, regimes and policies, highlighting issues and making recommendations to the State Party concerned. In June 2011 it published its concluding observations on Ireland.³²⁷ It expressed concern about the overcrowding and continued use of “slopping-out” in some prisons, in addition to the deficient provision of healthcare in a number of prisons. In May 2010 in its concluding observations on France it described overcrowding in prisons as critical and alarming.

The above cases and reports do not paint a pretty picture of detention conditions across the EU. They illustrate that HRs problems exist in relation to prison conditions and that it is not simply a moot point but a live issue. Courts executing an EAW are therefore under an obligation to examine such allegations, making use of the available material.

6.2.2 Prison Regimes

Even in those institutions where the conditions are of a good standard, detention may fall foul of Article 3 because of the prison regime imposed on individuals. Whilst the regime in principle may comply with the Article 3 requirements, it is the effect on the individual and their human dignity which will play a key role in the assessment.

One example of a prison regime is strip searches. Whilst the ECtHR accepts that strip searches may be occasionally necessary for security reasons,³²⁸ it maintains that they require a heightened level of justification.³²⁹ The ECtHR held that the regime Mr Van der Ven was subjected to what amounted to degrading treatment.³³⁰ He was kept in a high security prison and subjected to automatic weekly strip searches including anal inspections and were inflicted without any regard as to whether or not the applicant had

³²⁷ CAT/C/ IRL/CO/1, 17.06.2011

³²⁸ For example, in *McFeeley and others v. UK* (8317/78, Judgment 15.05.1980) the ECtHR held that strip-searches of prisoners who had in the past concealed dangerous objects in their orifices was reasonable even when performed at intervals of 7-10 days before and after visits and transfer to a new wing of the prison.

³²⁹ *Lorse v. Netherlands*, 52750/99, Judgment 4.02.2003

³³⁰ *Van der Ven* (n302)

been exposed to the outside world. In Lithuania, when a detainee was ordered to strip naked in the presence of a female police officer and had his genitals examined by guards, the ECtHR found a violation of Article 3.³³¹

What will be evaluated is the effect on the individual, other examples include segregation³³² and mandatory work³³³.

In its 2009 report on Greece³³⁴ the CPT found that female prisoners were subjected to vaginal searches every time they left the prison facility. In its 2010 concluding observations on France, CAT expressed concern for the high level of suicides including 15% being committed whilst in solitary confinement whose use CAT also expressed concern. CAT further expressed concern at the intrusive and humiliating nature of body searches, especially internal whose frequency and methods is by the prison authorities themselves.³³⁵

Once again both the caselaw and CPT reports highlight the real risk of an individual being subjected to regimes in the EU falling foul of Article 3. These demonstrate that such high-level MR is perhaps premature, requiring further work to be done on raising the standards in practice.

6.3 Executing State Responsibility Under Article 3

Extradition is another example of where a lawful act of a State authority can indirectly amount to an Article 3 violation. There is no right to not be extradited and in fact it is a procedure that has been employed legally by sovereign states for many years.

³³¹ *Valašinas v Lithuania*, 44558/98, Judgment 24.07.2001. It is also interesting to note that in this case the ECtHR found that the applicant's detention in cells which measured 2.7m² and 3.2m² did not violate Article 3 because this restriction was compensated by the freedom of movement granted to him during the day.

³³² See *Mathew v. the Netherlands* (24919/03, Judgment 29.09.2005) where he was kept in solitary confinement for 19 months.

³³³ *Nazarenko v. Ukraine*, 39042/97, Judgment 29.04.2003

³³⁴ CPT, *Report to the Government of Greece on the visit to Greece carried out by the CPT from 17 to 29 September 2009*, CPT/Inf (2010) 33

³³⁵ CAT/C/FRA/CO/4-6

Nevertheless, the responsibility of the State is engaged when extraditing or surrendering an individual to a situation which would violate Article 3.

The obligation stems from the seminal case of *Soering*, where a German national was resisting extradition to the US where if convicted he would face the prospects of years on “death row” which the ECtHR held violated Article 3. The question the ECtHR considered for the first time was whether the UK’s responsibility was engaged under the ECHR. It affirmatively held that “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”³³⁶

This has since been confirmed in numerous judgments,³³⁷ In establishing this obligation it is not the ECtHR’s intention to create safe havens for fugitives, rather it is ensuring that the spirit of the ECHR is complied with and that the absolute nature of Article 3 is enforced. This position has been endorsed by the EU. In addition to Article 4 CFR, Article 19(2) CFR provides that,

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

In the CFR Explanatory text, it states that Article 19(2) incorporates the case law of the ECtHR regarding Article 3 ECHR, citing the cases of *Ahmed v. Austria*³³⁸ and *Soering*. A review of EU legislative documents and other sources shows that the use of ‘serious’

³³⁶ *Soering* (n177) §91. Following the ECtHR judgment, the UK obtained further assurances from the US and Mr Soering was extradited to the US where he was convicted of the double murder. Those curious to know the fate of Mr Soering may visit his own website at: www.jenssoering.com/

³³⁷ *Chahal* (n246). The principle has also been endorsed as applicable under the ICCPR by the UN Human Rights Committee in *Kindler v Canada* (470/1991, 30.07.1991, CCPR/C/48/D/370/1990 §6.2).

³³⁸ *Ahmed v Austria*, 25964/94, Judgment of 17.12.1996

rather than ‘real’ risk is not significant and that these words are used interchangeably throughout the EU *acquis*.³³⁹

6.3.1 Burden of Proof

Where an individual sustains injury whilst in detention, the burden of proof is on the State to prove that it was not inflicted by the police officers or that it was inflicted in justifiable circumstances.³⁴⁰

However in other situations, despite extradition itself not being equated as criminal, the Article 3 standard of proof (burden on individual) equates to a criminal standard of proof. The evidence must prove beyond a reasonable doubt that a real risk of ill treatment exists.³⁴¹ Given the potential impact on an individual, taken together with the fact that the I-MS no longer has to show a *prima facie* case, it is arguable that the standard should be lower for the individual. The Irish Supreme Court appears to be in agreement. In *Rettinger*³⁴² they state that when considering the level of danger, the individual does not have to show that they will probably suffer prohibited treatment but that there is a real risk of it; the court dismisses a lower burden of a mere possibility. The standard of proof is less than proving it is probable but more than showing it is a mere possibility. The court is clear that whilst there is an evidential burden on the individual, the court must conduct a rigorous test and if necessary obtain additional material on its own motion. Once a risk is established it is up to the I-MS to provide evidence to the contrary. The Irish Supreme Court in *Rettinger* also provides

³³⁹ EU Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no. 3-2006: The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ('Extraordinary Renditions')*, 25.05.2006, Cfr-cdf.opinion3.2006

³⁴⁰ *Tomasi v France*, 12850/87, Judgment 27.08.1992

³⁴¹ *Shamayev and Others v Georgia and Russia*, 36378/02, judgment 12.10.2005, §338

³⁴² *Minister for Justice, Equality & Law Reform v Rettinger* [2010] IESC 45. The test set out in *Rettinger* has been applied in subsequent cases by the Irish courts but with little success on the part of individuals resisting surrender; see *MJE v Siwy* [2011] IEHC 252; *MJELR v Mazurek* [2011] IEHC 204 (evidence provided of historical nature whilst recent government statistics show different story); *Minister for Justice & Equality v Rajki* 2012 IEHC 270 (evidence not sufficiently cogent or related to own region).

clarification on the test to be applied stating that the objectives of the EAWFD system cannot defeat an established real risk of treatment contrary to Article 3.

Currently, it is normally for the individual to show “substantial grounds” that Article 3 would be violated.³⁴³

It is also not sufficient to point to a general situation alone or to a finding that detention conditions in one prison have been found to be in violation of Article 3. Individuals must show that there is a real risk of prohibited treatment being inflicted against them specifically. In the case of *Salah Sheekh* it was sufficient to show the threat to a minority clan in Somalia and that the individual was a member of this clan. By analogy, if it is certain that an individual will be detained in a specific prison where the overcrowding levels have been assessed as being contrary to Article 3, this may be sufficient. In *Targosinski*,³⁴⁴ the court stated that a finding of the ECtHR of a systematic violation could be regarded as clear and cogent evidence of the risk.

We repeatedly see, in cases where surrender is resisted on the basis of prison conditions and the court’s rejection of the argument on the basis that a real risk to the individual has not been proven.³⁴⁵

6.3.2 Assurances

Where such risk has been proven assurances have been obtained from the I-MS that the individual will not be placed in that particular prison. Where an international convention applies, States are obliged to investigate whether application of the domestic or international law would comply with the ECHR.³⁴⁶ The ECtHR has imposed procedural

³⁴³ A mere possibility is not sufficient. See *Vilvarajah and Others v. UK*, 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87, Judgment 30.10.1991, §107; *H.L.R. v. France*, 24573/94, Judgment 29.04.1997, §37; *Hilal v. UK*, 45276/99, Judgment 6.03.2001, §60

³⁴⁴ *Targosinski v Judicial Authority of Poland* [2011] EWHC 312 (Admin)

³⁴⁵ See *Krzyzak v Poland* [2012] EWHC 810 (Admin)

³⁴⁶ *Neulinger and Shuruk v. Switzerland*, 41615/07, Judgment 6.07.2010. In this case the ECtHR examined an alleged violation of Article 8 for the return of a child to Israel under the Hague Convention

duties on domestic courts to investigate possible violations of Convention articles even where diplomatic assurances are supplied.

Diplomatic assurances and accession to international treaties do not necessarily replace this duty “to examine whether such assurances provided, in their practical application, a sufficient guarantee”.³⁴⁷ Whilst diplomatic assurances from countries such as Tunisia³⁴⁸ or India³⁴⁹ have not been sufficient to dismiss the responsibility of states, there have been instances where the ECtHR has been satisfied.

In *José Alejandro Peñañiel Salgado v. Spain*,³⁵⁰ the Court recalled its constant jurisprudence that extradition may raise an issue under Article 3, and the implied obligation not to extradite the individual to the country in question. It reiterated that in doing so the State would be acting in a manner inconsistent with the “common heritage of political traditions, respect for freedom and the rule of law” referred to in the Preamble of the Convention. In the present case the Court stated that Spain should consider the dangers involved in the extradition in light of the principles established by the ECtHR jurisprudence, to assess if the consequences of sending the applicant to Ecuador were likely to invoke Article 3. The responsibility of a state for exposing someone to the risk of Article 3 prohibited treatment is to be assessed on the basis of the circumstances which the state in question knew or should have known at the time of the extradition, although this does not prevent the Court from considering later information, which can be used to assess whether the state concerned considered the merits of an applicant's fears.

on Child Abduction. While it preserved the role of the Swiss courts in applying its own interpretation of international agreements, it found that the family situation revealed emotional, psychological, and material factors that weighed against return of the child and would deem the return contrary to Article 8.

³⁴⁷ *Saadi v. Italy* (n296) §148

³⁴⁸ *ibid*

³⁴⁹ *Chahal* (n244)

³⁵⁰ *Salgado* (n591)

The Court noted that on the applicant's own admission, his application to the Court helped to ensure his own security in Ecuador (knowledge of the Rule 39 interim measure was widespread, and various institutions in Ecuador including the President were forced to provide assurances to the Court that the applicant's rights would be respected in Ecuador). Accordingly, the Court found that the circumstances of this case and the assurances given by the Government of Ecuador were likely to avert the danger of abuse that the complainant was afraid of before his extradition. In addition and in similar vein to its current stance *vis a vis* EU MSs, the Court noted that in any event and for any alleged infringement of his HRs as the applicant may suffer, Ecuador is party to the American Convention on Human Rights since 1977 and had recognized the jurisdiction of the Inter-American Court of Human Rights in 1984.

Before the UK courts, diplomatic assurances and declarations have been deemed sufficient to erase the risk of Article 3 prohibited treatment. In *S*³⁵¹ the assurance that sufficient medication would be available for the individual meant that *S* could be surrendered. In *La Torre*,³⁵² a declaration that the individual would not be subjected to the Article 41 bis treatment was again deemed sufficient by the UK courts despite the practical effectiveness of the declaration being disputed.³⁵³

It is likely that assurances from an EU MS be accepted as sufficient. The two key reasons for this are firstly mutual trust and secondly that as signatories to the ECHR the individual will not lose their right to petition the ECtHR if promises are not kept.

³⁵¹ *S v Poland* [2010] EWHC 915 (Admin)

³⁵² *La Torre v Italy* [2007] EWHC 1370 (Admin)

³⁵³ Article 41 bis referred to the regime in place to tackle the mafia. In the judgment the court states and cites that it "operates with the intention of effectively 'breaking' people so as to induce them to make confessions and co-operate with the authorities." The lower Court had accepted that the operation of the Article 41 bis regime has, in the past, resulted in 'mistreatment' of prisoners. The consistency of complaints, the number of independent enquiries and the failure of the Italian authorities properly to investigate the allegations all give cause for concern.

Nevertheless the ECtHR line of jurisprudence remains relevant; in particular the requirement that if assurances are sought, the sending state has to have the power to monitor compliance. For example, in Egypt, visiting the individual in prison was not enough since this was always done in the presence of prison guards.³⁵⁴ Likewise surrendering a refugee to Italy and only obtaining a guarantee that he would face a fair trial will not be sufficient when there is a possibility of onward removal contrary to Article 3. Even when surrendering under the EAW, the E-MS must ensure that the individual is protected from all foreseeable risks.³⁵⁵

6.4 A Closer Look at Article 3 and the EAW / The threshold

Failures to fulfill and respect obligations under Article 3 have wider implications for the principle of MR in criminal matters and the AFSJ. Article 3 and its jurisprudence sets out the standards and benchmarks of acceptable use of force during arrest and the conditions of detention. These standards are of equal applicability to both the E-MS following an EAW arrest and also the I-MS. The *Soering* line of jurisprudence links the duty of the I-MS, in relation to the surrendered person, to the obligations of the E-MS. If substantial grounds exist to believe that there is a risk of Article 3 prohibited treatment upon surrender, then the E-MS cannot surrender. This is elaborated in both the *M.S.S.* and *N.S.* cases considered in the next section.

In resisting surrender an individual can allege that upon surrender they would face the prohibited treatment. Before UK courts different arguments seem to be particularly popular at different phases. Their popularity may be due to an ECtHR judgment or due to it being successfully run before a UK court. As seen above the ECtHR cases finding a

³⁵⁴ *Agiza v Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005)

³⁵⁵ See (1) *Habib Ignaoua*, (2) *Mohamed Salah Ben Hamadi Khemiri & (3) Ali Ben Zidane Chehidi v The Judicial Authority of the Courts of Milan, The Serious and Organised Crime Agency, The Secretary of State for the Home Department* [2008] EWHC 2619 (Admin). There are two applications pending before the ECtHR, one against the UK and the other against Italy. The UK case relates to the risk of onward removal to Tunisia by Italy following their surrender under the respective EAWs. The case against Italy concerns the immediate issuance of expulsion orders following acquittal for the charges they were surrendered for.

violation of Article 3 against Poland because of overcrowding in certain prisons, led to a sharp increase this argument being run before UK courts.

Individuals successfully resisting surrender because of a suicide risk also had a butterfly effect increasing the number of individuals claiming that if surrendered they would commit suicide. What both these examples illustrate is that the UK courts will quickly take a strict and stern approach to ‘copycat’ pleadings; meaning that few are successful. In terms of the burden of proof it is placed very high for an individual to establish a real suicide risk. Mr Jansons³⁵⁶ successfully resisted surrender, the court noted that he had previously tried and almost succeeded in committing suicide. In addition evidence indicated that surrender would impact on his mental health and that this would lead him to trying again. Despite assurances from the Latvian authorities that they would take care of him, the UK court found that these were striking and unusual circumstances and it would therefore be disproportionate to surrender him.

The high benchmark is reflected in all cases where Article 3 arguments are made. Strong evidence needs to be adduced showing that the authorities would not be able to protect an individual³⁵⁷ or that they would cause harm to the individual. In *Ogonowski*,³⁵⁸ the fact that several years had passed since the police previously beat him up. This taken with the fact that he would spend little time in custody meant that the risk he would be beaten when surrendered was low.

Perhaps the most difficult to reconcile with the E-MS’s obligations are judgments such as Mr Symeou’s. Mr Symeou provided evidence that the two key witnesses against him had been held incommunicado and subjected to intimidation before agreeing to sign identical statements in a language they did not know; statements which were revoked on

³⁵⁶ *Jansons v Latvia* [2009] EWHC 1845 (Admin)

³⁵⁷ See *Nawara v Poland* [2011] EWHC 3725 (Admin)

³⁵⁸ *Ogonowski v Poland* [2007] EWHC 2445 (Admin)

return to the UK. The UK courts held that the matters complained of were for the trial judge in the I-MS to consider and not factors which could displace their obligation to surrender him under the EAWFD.³⁵⁹ Evidence showing previous and recent behavior of authorities was not enough to prevent surrender. It needs to be noted that such arguments are not about whether the evidence shows a *prima facie* case, but rather a need to assure that the individual will not be subjected to the same treatment. This obliges the E-MS to conduct a closer examination of the realities the individual may face, where appropriate to obtain assurances and where necessary to refuse surrender, despite of MR.

6.4.1 A Bizarre Alchemy

24. The passage makes it clear that the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the “minimum level of severity” which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account.³⁶⁰

Extradition is not a magic ingredient which when added to the mix makes treatment assessed as inhuman and degrading less heinous. How can the search for justice justify Article 3 prohibited treatment? Article 3 contains a threshold scale and in spite of the classification of the Article 3 treatment it is absolutely prohibited. Complicity in a HRs violation which occurred by virtue of a state's decision to surrender an individual works two ways. Firstly, it forces states to protect the rights of all those within its jurisdiction and to not simply wash their hands of 'undesirables'. As Nelson Mandela said “A nation should not be judged by how it treats its highest citizens, but it's lowest ones” usually the ‘undesirables’. Secondly, it helps promote HRs by encouraging/enticing states to

³⁵⁹ *Symeou v Greece* [2009] EWHC 897 (Admin)

³⁶⁰ *R (on the application of Wellington) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) (Criminal Appeal from Her Majesty's High Court of Justice)* [2008] UKHL 72, per Lord Hoffman. The application to the ECtHR was struck out when the applicant informed the ECtHR that he wished to return to the USA to stand trial. *Wellington v UK*, 60682/08, Admissibility Decision 5.10.2010.

respect HRs. The carrot in this scenario being the promise of greater cooperation with other states. If a state wants to provide justice it needs to do so with clean hands by respecting due process and providing safeguards.

28. Treating article 3 as applicable only in an attenuated form if the question arises in the context of extradition or other forms of removal to a foreign state is consistent with the ECHR's jurisprudence on the applicability of other Convention articles in a foreign context.³⁶¹

The above paragraph from, *Wellington* shows that both the ECtHR jurisprudence and Lord Bingham's judgment in *Ullah* in relation to the strength of the alleged treatment have been misinterpreted. It is clear that what is said in *Ullah* is meant for rights "other than Article 3".

While the Strasbourg jurisprudence does not preclude reliance *on articles other than article 3* as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case.³⁶²

Borrowing from the words of Lord Scott,³⁶³ if it would constitute torture in one EU MS it would constitute torture in all EU MS. That is after all the foundation of MR and the mutual trust and confidence that HRs are equally protected across all MSs. Thus if the treatment equates to Article 3 prohibited treatment in the E-MS, the same will be true of the treatment when carried out in the I-MS and thus surrender is not permitted.

Requiring an 'attenuated form' of the same treatment before surrender will be refused, only because it is in the context of extradition is a warped sense of justice.

The Article 3 test of the treatment is subjective and the relativist approach can be applied when considering the seriousness of the offence and proportionality of the punishment. The meaning of §89 in *Soering* has been over the years distorted.

³⁶¹ *Ibid* per Lord Hoffman

³⁶² *R (Ullah) v Special Adjudicator* [2004] 2 A C 323, §24 (Emphasis added)

³⁶³ "that that which would constitute torture for Article 3 purposes in Europe would constitute torture for those purposes everywhere." *ibid* §40

What amounts to inhuman and degrading treatment or punishment depends upon all the circumstances of the case. . . As movement around the world becomes easier and crime takes on a large international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundation of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.³⁶⁴

For example in an equation, if the person is wanted for theft of a chocolate bar for which he can only be prosecuted in the I-MS the weight given to the interest of bringing him to justice would not be as strong as if he was wanted for murder.

Taking *Soering* back to basics what is being referred to there is ultimately the proportionality of the punishment. So once again it could be considered inhuman to hold a person in maximum security for 25 years for stealing the chocolate bar, however the same punishment would not necessarily violate Art 3 if he had been committed of murder. However once the potential treatment has been assessed as prohibited by Article 3 (in accordance with the ECtHR jurisprudence) that should be the end. The fact that the assessment is part of extradition proceedings does not raise the threshold bar.

What *Soering* does not do is to set a lower threshold in the domestic context and a higher threshold if the person is to be extradited. The threshold set by the ECtHR is the same in all circumstances. Citing the cases of *Chahal* and *Saadi v Italy*, Lord Brown disagrees with Lord Hoffman, whilst it is obviously desirable for Mr Wellington to be extradited and tried rather than securing a safe haven in the UK, the threshold of what equates to inhuman and degrading treatment or punishment is not heightened.³⁶⁵ He concludes that there is “...no room in the Strasbourg jurisprudence for a concept such as the risk of a flagrant violation of article 3’s absolute prohibition against inhuman or

³⁶⁴ *Soering* (n177) §89

³⁶⁵ *Wellington* (n360) §85

degrading treatment or punishment (akin to that of the risk of a “flagrant denial of justice”).”³⁶⁶

In addition to the proportionality of punishment *Soering* lists other circumstances which may be relevant,

...The assessment of this minimum is, in the nature of things, relative; it depends upon all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.³⁶⁷

A state is free to elect a higher national standard. Perhaps the problem is wrongly assessing the treatment in accordance with the domestic standards which may be higher than the ECHR ones and then feeling the need to adjust this assessment to the particular circumstances of the case. It is not required that the higher domestic standard is applied to circumstances in other states, their standards are to be assessed (at a minimum) in accordance with the ECHR standards. These norms are of equal application to the EAW.

The desirability of not creating safe havens and ensuring that individuals do not escape justice are considerations which factor into the assessment of the treatment. Once it has been ascertained that the treatment or punishment in the other state would not comply with Art 3, the obligation not to submit the individual to that treatment is absolute irrespective of whether they would escape justice. As recalled by Lord Carswell, in *Saadi v Italy*³⁶⁸ the ECtHR makes clear that “the risks to the expelling state if such a person is not deported cannot be weighed against the risk of his ill-treatment in the receiving state”. This is one of the modifications to *Soering*, the undesirability of

³⁶⁶ *ibid* §86

³⁶⁷ *Soering* (n177) §100

³⁶⁸ (n296) §138

housing an individual who has escaped justice because of the Article 3 bar to his extradition cannot be weighed against the Article 3 assessment of his treatment.

6.5 Principle of Equivalent Protection

“Obviously one cannot approach the issue of extradition to a state which is not a party to the Convention as if its provisions applied there with full force”³⁶⁹ but the protection on offer needs to be comparable. The principle of equivalent protection was developed by the ECtHR after *Soering*. It clearly states that whilst MSs are free to give part of their sovereignty to international regimes and agreements, they still remain bound by their ECHR obligations. As such they need to ensure that their actions do not violate an individual's rights, even when it would be caused by a foreign state. So whilst the ECHR does not apply in full force to the USA, Council of Europe MSs need to be satisfied that the treatment in the USA would be compliant with the ECHR standards. As such paragraph 86 of *Soering*³⁷⁰ has been modified by subsequent ECtHR cases.³⁷¹

When called upon to adjudicate on the HRs compliance of a MS in fulfilment of their obligations under another intergovernmental organisation, the ECtHR will assess whether this other system has sufficient built-in protection (both substantial and enforcement mechanisms). It will then take one of two avenues; as De Jesus Butler describes it where protection is lacking it will revert to a “parochial approach” and where it believes it is sufficient it will adopt an “international constitutional

³⁶⁹ *Wellington* (n360) §56 per Lord Carswell

³⁷⁰ “Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.”

³⁷¹ See for example *Şirketi Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, 45036/98, [GC] Judgment 30.06.2005 (also referred to as the *Bosphorus* case)

approach”.³⁷² In order to ascertain the adequacy of the HRs protection, the ECtHR has developed the principle of equivalent effect. This was set out in *Şirketi*,³⁷³

By “equivalent” the Court means “comparable”; any requirement that the organisation's protection be “identical” could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

Şirketi concerned the impounding of an aircraft in accordance with an EC regulation implementing an UN Security Council Resolution (UNSCR). Membership of international organisations and compliance with the obligations which flow from such membership, including the EU, is regarded the pursuit of a legitimate aim.³⁷⁴ The ECHR does not prohibit the transfer of sovereign power to an international organisation. The ECtHR will assess the protection mechanism of the international organisation, however it is the Contracting Party which remains responsible for HRs violations.³⁷⁵ This is true even when the transfer to an international organisation alters the due process mechanism.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

The *Şirketi* case creates a presumption that the EU provides equivalent protection of HRs in terms of both substantive and procedural guarantees.³⁷⁶ However the presumption is rebuttable if the protection is considered ‘manifestly deficient’. If this is the case the interest of international cooperation would be outweighed by the ECHR.

There is therefore a two step test; (1) are HRs protected in a comparable way by the other regime, if they are the presumption is that the State acted in compliance with the

³⁷² Israel De Jesus Butler, *Securing human rights in the face of international integration*, ICLQ 2011, 60(1), 125-65

³⁷³ *Şirketi* (n371) §155

³⁷⁴ *Ibid* §150, citing *S.A. Dangeville v. France*, 36677/97, Judgment 16.04.2002

³⁷⁵ *Ibid* §152-4

³⁷⁶ *Ibid* §159-65

ECHR;(2) has evidence been presented to show that the protection in the present case is ‘manifestly deficient’, noting that the applicant must raise the issue.³⁷⁷ Further clarification has been set out in *Biret*, where the ECtHR held that an act of the MS is required in order for them to be complicit in any HRs interference.³⁷⁸ However where the case only concerns the act of the international organisation, the ECtHR will continue to identify a manifest deficiency of HRs protection where the complaint concerns a “structural deficit in the internal mechanism for conflict resolution”.³⁷⁹

In EAW cases there is clearly an act of a MS, initially by the I-MS and possibly also by the E-MS. As we have seen there is a strong presumption that the EU provides an equivalent protection of HRs. However it is possible to rebut this presumption if in the particular case there was a manifest deficiency in the protection of HRs. Arguably there is a structural deficit in the internal mechanism, namely that MR prevents the E-MS from conducting a full ECtHR compliant assessment unless the high threshold is to rebut the MR presumption is first met. Additionally in part the reason why the *Şirketi* presumption in relation to the EU is relatively strong is because of the HRs protection offered by the CJEU. Until the entry into force of the Lisbon Treaty³⁸⁰ the adjudication of third pillar measures, including the EAWFD, was restricted. Post-Lisbon it continues to be restricted in relation to the UK.³⁸¹ Arguably it should be easier to rebut the

³⁷⁷ There have been a number of other cases which apply the equivalent protection principle however they concern obligations flowing from other international organisations (such as the UN and NATO) and as such do not add anything further to the presumption in relation to the EU. For example the cases of *Behrami and Behrami v France* (71412/01) and *Saramati v France, Germany and Norway*, (78166/01, Admissibility Decision 2.05.2007 §151) were distinguished from *Şirketi* because the acts did not occur on the territory of the State but also because they concerned the acts of troops which the ECtHR held were attributable to the UN. The ECtHR specifically states that there was “a fundamental distinction...their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.”

³⁷⁸ In the present case the applicant was an importer of beef from the USA whose business dissolved because of two EU Directives banned the importation of USA beef because of the use of prohibited hormones. *La Societe Etablissements Biret Et Cie S.A. Et La Societe Biret International c. 15 Etats*, 13762/04, Decision 09.12.2008

³⁷⁹ *Gasparini v Italy and Belgium*, 10750/03, Decision 12.05.2009

³⁸⁰ (n173)

³⁸¹ The UK negotiated Protocol 21 in the Treaty of Lisbon extending the opt-in procedure to include proposals under what had been Third Pillar provisions. Under the TFEU the jurisdiction of the CJEU has

presumption in relation to the UK's implementation of the EAW. The reality is that the scrutiny conducted by the ECtHR is superficial and provided that the regime normally protects HRs and has the mechanism in place it will be satisfied of the required equivalence.³⁸²

The CJEU has taken a giant leap forward, making it clear that international agreements and obligations need to be compliant with EU law and consequently also the ECHR.³⁸³

The CJEU in the *Kadi* case was called to consider the potential conflict between a UNSCR and EU law which led to the freezing of assets belonging to a list people suspected of having links with Al-Qaeda.³⁸⁴ Mr Kadi and Mr Al Barakaat sought the annulment of the regulation on the basis of lack of competence and violation of their fundamental rights. The Court of First Instance³⁸⁵ dismissed the case on the basis that they lacked jurisdiction to review the claims given that UN law prevailed over EU law. On the other hand the CJEU found the opposite, whilst they could not review the lawfulness of the UNSCR, they were able to rule on the EU measure implementing the said UNSCR. The CJEU stated that not only did they have jurisdiction but they were under an obligation to ensure that all EU law was compatible with the constitutional values of the EU including the rule of law and fundamental rights, thus bypassing the principle of equivalent effect.

been extended to AFSJ (Title V) measures. This extended jurisdiction is subject to a 5-year transitional period under Article 10 of Protocol 36 (which expires on 30 November 2014). During this time the powers of the CJEU in relation to Third Pillar measures adopted before the Treaty of Lisbon came into force remain the same as previously under the TEU. In relation to the UK this means that the CJEU has no jurisdiction to make preliminary rulings. See House of Lords, *European Union Committee - Thirteenth Report, EU police and criminal justice measures: The UK's 2014 opt-out decision*, 16 April 2013

³⁸² See Tobias Lock, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention of Human Rights*, HRLR 10 (2010), 529-45

³⁸³ Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council* [2005] ECR II-03533 and Case T-315/01 *Kadi v Council and Commission*, [2005] ECR II-03649. See also C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-06351

³⁸⁴ The applicants were designated by the Sanctions Committee of the UN Security Council for the purpose of Security Council Resolution 1333 (2000) and added to the list maintained by the UN Security Council. Implementing the UNSCR the EU adopted Regulation 467/2001, adding the names of the 2 applicants to their list of designated persons,

³⁸⁵ *Yusuf* (n383) and *Kadi* (n383)

It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations. [§324]

Taking into account the security concerns and aims of the UN, the CJEU distinguishes itself from the position adopted by the ECtHR in cases like *Samrati* and *Behrami*,³⁸⁶

it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice...³⁸⁷

The CJEU makes it clear that these do not displace the judicial review powers of the court and the need for individuals to have access to justice.³⁸⁸

³⁸⁶ *Behrami; Saramati* (n377)

³⁸⁷ *ibid* §344

³⁸⁸ There is vast literature on the *Kadi* Judgments, see, E. de Wet, 'Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: a case of 'be careful what you wish for'', in J. Farrall, K. Rubenstein, J. Farrall & K. Rubenstein (Eds.), *Sanctions, accountability and governance in a globalised world*, 2009, 143-168; S Besson, *European Legal Pluralism after Kadi*, EuConst 5 (2009); K.S Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, Human Rights Law Review (2009) 9 (2): 288-305; A Cuyvers, *Case Comment: The Kadi II judgment of the General Court: the ECJ's predicament and the consequences for Member States*, E.C.L. Review 481, 2011; J Kokott and C Sobotta, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?* EJIL 23 (2012), 1015–1024; M Tzanou, *Casenote on Joined Cases C - 402/05 P & C - 415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union & Commission of the European Communities*, German Law Journal, Vol. 10 No. 02 2009. For a consideration of the differing views of Advocate General Maduro and the CFI see, J Larik, *Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case*, College of Europe EU Diplomacy Papers 3/2009 and T Tridimas and JA Gutierrez-Fonsy, *EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?* Fordham International Law Journal Vol. 32: 660, 2009. On 18 July 2013 the Grand Chamber of the CJEU delivered a second judgment in favour of Mr Kadi (known as Kadi II). It held again that even where the UN is concerned, the EU is still required to ensure that a review of the lawfulness of the EU measure is conducted. Secondly it held that the judicial review of whether sufficient basis existed to list Mr Kadi had to be based on a "sufficiently solid factual basis" and that whilst not all evidence had to be produced, at least one sufficiently justified reason had to be presented. In holding this, it rejected Advocate General Bot's opinion that judicial review of UN sanctions concerning counter-terrorism had to be "limited". The CJEU concluded that none of the allegations had been supported by evidence and thus the Regulation listing Mr Kadi should be annulled. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Commission, Council, United Kingdom v Yassin Abdullah Kadi, 18 July 2013

The strong stance in the face of UNSCR highlights the primacy of HRs and the rule of law within the EU legal framework. This goes some way in explaining why explicit provisions on HRs are not deemed necessary by the CJEU or the legislative bodies of the EU. The message is clear that all EU measures, including those addressing security threats, must comply with fundamental rights. The need to codify these obligations with specific relevance arises when conflicting messages are sent by central principles (such as MR) and primary aims of measures (such as combating serious cross-border crime). In theory, these, just like UNSCR, cannot undermine HRs and the ability of individuals to challenge the implementation of EU measures on this basis. In practice MSs require the occasional reminder and national courts require a specific mandate to displace the appearance that MR has primacy over fundamental rights.

6.6 An Asylum Analogy

The question is whether the EAWFD, the numerous EU proclamations of commitments to HRs and of course membership of the ECHR are a sufficient basis for MSs to dismiss their usual obligations under Article 3 (and other rights). This has in part been answered by both the ECtHR and the CJEU. Although these judgments were in the context of the EU asylum *acquis*, by analogy they can be applicable to MR measures in criminal matters.³⁸⁹

³⁸⁹ Since 1999 the EU has been developing a common asylum Common European Asylum System (CEAS) and by 2005 several legislative measures harmonising common minimum standards for asylum were adopted. In 2007 consultation begun to improve the CEAS, resulting in the adoption of revised legislation. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national is replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person when it enters into force on 20 July 2015; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers is replaced by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection when it enters into force on 21 July 2015; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status is replaced by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

With regards to the obligation on MSs to investigate prison conditions, lessons can be taken from the approach to the duty in relation to conditions that individuals will face upon deportation in the asylum context. In *M.S.S. v. Belgium and Greece*,³⁹⁰ the ECtHR held that states have a duty to investigate the reality that asylum seekers removed under the Dublin II Regulations would face. By returning individuals to Greece, where there was a real risk their Article 3 right would be violated, Belgium would be in violation of Article 3. The violations occurred both due to the detention conditions in Greece, and on the basis of the procedural inadequacies of the Greek system that put him at risk of onward deportation to Afghanistan where he faced a risk of ill-treatment. In *M.S.S.*, the ECtHR held that existence of domestic laws and international treaties are not in themselves sufficient to ensure adequate protection. States continue to be under an obligation to investigate the circumstances asylum seekers will face upon return.

In addition, the ECtHR maintained that the burden of presenting evidence of a risk of ill-treatment is not entirely on the individual; states must show reports of their investigation. Reports that are framed in “stereotyped” terms will not be considered as evidence of a convincing investigation into the true circumstances. The ultimate test is the *Osman*³⁹¹ formulation; whether a state knew or ought to have known that conditions

when it enters into force on 21 July 2015; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted is replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted when it enters into force on 21 December 2013; and Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention is replaced by Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice when it enters into force on 20 July 2015.

³⁹⁰ 30696/09, [GC] Judgment 21.01.11

³⁹¹ *Osman* (n625)

of detention in another state would give rise to an Article 3 violation. If the answer is yes, the state will be in violation of Article 3 when sending an individual into those circumstances.

In *NS*,³⁹² the CJEU takes the baton from the ECtHR affirming its findings in *M.S.S.*. As with the EAWFD, the CJEU first observed that the system “was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights... and that the Member States can have confidence in each other in that regard.”³⁹³ It went on to identify that at,

“issue here is the *raison d’être* of the European Union and the creation of an area of freedom, security and justice...based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.”³⁹⁴

The EAW is part of this AFSJ and as such the questions considered by the CJEU are of equal relevance to the EAW.

MSs are obliged when preparing to send an asylum seeker to another MS to examine the practical reality of asylum procedures beyond nominal signature to EU treaties. It also clarified that a conclusive presumption (not admitting evidence to the contrary) could itself be considered as undermining EU safeguards which seek to ensure compliance with HRs. Adding that the presumption an asylum seeker’s rights would be respected in the receiving MS must be regarded as rebuttable.³⁹⁵

It follows that the presumption that procedural guarantees and the rights of individuals will be respected once surrendered under an EAW must also be rebuttable. Mutual trust cannot be used as a barrier to effective consideration of allegations.

³⁹² Joined Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E., A. S. M., M. T., K. P., E. H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2011] ECR 00000

³⁹³ *ibid* §78

³⁹⁴ *ibid* §83

³⁹⁵ *ibid* §§99-105

The CJEU also affirmed that where a MS “cannot be unaware” of systemic procedural deficiencies or detention conditions, “this would amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of”³⁹⁶ Article 4 CFR and must not therefore be transferred. To this end MSs are under an obligation to review a wide range of information available to them prior to deciding whether to extradite or expel an individual to another country.³⁹⁷

In relation to the existence of systemic issues, to take one case as an example the ECtHR has held that structural problems relating to pre-trial detention exist in Poland, leading to excessive lengths of detention on remand.³⁹⁸ According to CJEU jurisprudence, since it cannot be said that an E-MS is unaware of the pre-trial conditions, it may be liable if it surrenders an individual to Poland who then falls victim to such excessive detention.

In many ways, in *NS*, the CJEU joins up many of the dots of a system which was developed without much joined up thinking. It takes into account the different Directives which the asylum *acquis* is composed of, as well as the EU Treaty and the CFR setting out that they are interrelated and that they must be read in compliance with the general principles of the EU and ECHR.

Given the cross-over of applicable principles and issues, it is evident that the principles set out in both *M.S.S.* and *N.S.* in relation to the asylum *acquis* apply *mutatis mutandis* to other cross-border AFJS matters, including the operation of the EAW system.

A line of jurisprudence demonstrates the dangers of over reliance on mutual trust or overzealous application of MR at the UK domestic level pre-*M.S.S.* and *NS*. In

³⁹⁶ *ibid* §106

³⁹⁷ *ibid* §§90-94

³⁹⁸ *Kauczor v Poland*, 45219/06, Judgment 3.02.2009

particular the excessive weight given in 3 judgments of the Administrative Court³⁹⁹ to the earlier ECtHR inadmissibility decision of *K.R.S.*⁴⁰⁰

In *K.R.S.*, the ECtHR had stated that in the context of a Dublin II transfer from the UK to Greece detention conditions in Greece were not the responsibility of the sending state. It is important to note that this case was declared inadmissible without it being communicated to the UK and there was therefore no opportunity for others to intervene including NGOs with knowledge of the situation on the ground in Greece. Subsequent events confirm that this decision was a blip in the jurisprudence and *K.R.S.* has since been deemed redundant by the Grand Chamber judgment in *M.S.S. v. Belgium and Greece*. In this case a number of parties intervened including a several NGOs. The ECtHR had also invited UNHCR and also the Council of Europe Commissioner for Human Rights, Mr Hammarberg (who exercised his power of intervention for the first time).

In addition to the excessive weight placed on the *K.R.S.* decision, Mitting J wrongly ignored the general principles set out by the ECtHR in previous cases. In particular, the case of *T.I. v. UK*,⁴⁰¹ which was recalled in *K.R.S.* In this decision the ECtHR clearly sets out that the UK could not automatically rely on the arrangements for responsibility in the Dublin Regulation. The establishment of international organisations or agreements in pursuit of cooperation could have implications for HRs and it would be incompatible with the ECHR for them to be absolved from their responsibilities under the ECHR in relation to such an attribution. “The Court observes, though, that the asylum regime so created protects fundamental rights, as regards both the substantive

³⁹⁹ *The Queen on the Application of Jan Rot v District Court of Lublin, Poland* [2010] EWHC 1820, *Dabowski v Poland* [2010] EWHC 1712 (Admin); and *Klimas* (n317)

⁴⁰⁰ *K.R.S.* (n318)

⁴⁰¹ 43844/98, Decision 7.03.2000. Decided under the Dublin Convention, the predecessor of the Dublin II Regulation

guarantees offered and the mechanisms controlling their observance.”⁴⁰² Reliance upon instruments adopted outside the ECHR system will not automatically absolve MS from their responsibilities under the ECHR. The ECtHR will examine the obligations flowing from membership of the instrument and in particular the HRs protection it offers. Whilst the Court lacks jurisdiction to interpret the instrument, it has its supervisory jurisdiction under Article 19 ECHR as to whether the operation of this instrument compromises the ECHR standards.⁴⁰³ As set out above, this is further elaborated in *Şirketi* where the ECtHR states that there is a rebuttable presumption of “equivalent protection” of HRs offered by other regimes or instruments. Whilst this rebuttable presumption applies to EU instruments, including the EAWFD, it was entirely ignored.

K.R.S. can be further distinguished on its facts, the UK had obtained an undertaking from Greece that there would be a right of appeal and that they would allow interim measures to be sought against any expulsion order. As the ECtHR stated in the absence of proof it must be presumed that Greece would respect its obligations and act accordingly towards any returnee. On this basis any Rule 39 application based on possible expulsion to Iran should be lodged against Greece and not the UK.

Detention conditions are not the only concern under Article 3 in relation to extradition (or expulsion). The risk of onward returns or extradition was an issue also considered in *K.R.S.* and later rectified in *M.S.S.*. It is interesting to note that this issue had been resolved over a year before *K.R.S.* in *Abdolkhani and Karimnia v. Turkey*⁴⁰⁴ which was followed by subsequent cases. In particular the relationship between Articles 3 and 13 and the need for a national remedy.

For his part, Mitting J relied on the following paragraph in *K.R.S.*,

⁴⁰² *ibid.* Decided under the Dublin Convention, the predecessor of the Dublin II Regulation.

⁴⁰³ *N.A. v. UK*, App. No. 25904/07, judgment of 17.07.2008

⁴⁰⁴ 30471/08, judgment of 22.09.2009

... the Court finds that were any claim under the Convention to arise from those conditions, it should also be pursued first with the Greek domestic authorities and thereafter in an application to this Court.⁴⁰⁵

However, where Mitting J was misled by *K.R.S.* in his understanding that this means transfer to the requesting state is automatic except in exceptional circumstances. The Mitting “wholly exceptional circumstances” (namely a military coup or revolution) test, is unrealistic and not in line with the ECHR. As previously stated the presumption that HRs would be protected is rebuttable by evidence.⁴⁰⁶ This starting point could not only lead to violations of the ECHR, but also in breach of section 6 HRA 1998. The Article 3 prohibition is absolute and therefore raising the standard to exceptional circumstances in effect denies an individual a remedy at national level.

The ECtHR was clear in *Abdolkhani* that Article 13 guarantees the availability of a remedy at the national level to enforce ECHR rights within the domestic legal order. The irreversible nature of the harm caused if the torture or ill-treatment alleged materialises together with the importance attached to Article 3 and the “notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect.”⁴⁰⁷

It can be concluded that Article 13 read in conjunction with Article 3 requires the E-MS court to ascertain whether the presumption is rebutted through scrutiny of the available evidence as to the risk. Disagreement with Mitting J can be seen in *Agius*⁴⁰⁸ where Sullivan J does not follow Mitting J. Taking into account the *M.S.S.* judgment, he states that the exceptional circumstances test goes too far. Whilst the presumption is in favour

⁴⁰⁵ *K.R.S.* (n318)

⁴⁰⁶ In *K.R.S.* the presumption was not rebutted, whereas in *M.S.S.* there was clear evidence capable of rebutting the presumption.

⁴⁰⁷ *ibid* (n404) §§106-7

⁴⁰⁸ *Agius v the Court of Magistrates, Malta* [2011] EWHC 759 (Admin)

of the I-MS, if clear and cogent evidence is presented, the presumption is capable of displacement.

Despite the evident applicability of the *M.S.S.* and *N.S.* judgments to the EAW and other MR measures, there is likely to be a time delay in extending these cases to the EAWFD by both the ECtHR and the CJEU. Ultimately reluctance to extend this jurisprudence is more about relationships between MSs rather than the law.

It still remains difficult to displace the presumption that HRs would be respected, however these cases make it clear that an examination should occur and membership of the ECHR is not to be regarded as sufficient on its own. In *M.S.S.* the ECtHR added that any complaint of potential Article 3 prohibited treatment requires rigorous scrutiny. In other words MR does not equate to scrutiny and is therefore not sufficient.

In *Radu*, the CJEU once again dodges the bullet, by narrowing the focus of their relevant jurisdiction. Whilst the judgment only considers the need for an individual to have been heard by the I-MS as a condition for their surrender,⁴⁰⁹ this does not diminish in any way the broader opinion of Advocate-General Sharpston in the case. For those MSs willing to listen she is clear that the EAW can not only accommodate HRs but that it must do so.

Sharpston states that the CFR form part of the primary law of the EU⁴¹⁰ reminding us that the ECHR has played a role since 1969 to the present day.⁴¹¹

41. While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested

⁴⁰⁹ The court finds that no such requirement exist in either prosecution or sentence EAWs. The Court held that “the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.” (§43 *Radu* (n158))

⁴¹⁰ *Radu* (n158) Opinion of Advocate-General Sharpston, §108

⁴¹¹ *Ibid* §49 citing Case 29/69 *Stauder* [1969] ECR 419, §7; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, §4; Case 4/73 *Nold* [1974] ECR 491, §13; and Joined Cases C 402/05 P and C 415/05 P *Kadi and Al Barakaat* [2008] ECR I 6351, §335.

person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice.

Sharpston states that there can be no automatic assumption that HRs will be protected in the I-MS; there can only be a rebuttable presumption that this will be the case. This is applying both the judgment in *N.S.* and the ECtHR jurisprudence which holds that evidence about the general situation will not normally suffice. Individuals are required to show evidence relating to their own personal circumstances.⁴¹²

Having ascertained that MSs must have regard to HRs when executing an EAW, Sharpston then considers when MSs must refuse to surrender and what factors they must take into account. The first step is to establish what interferences of rights are sufficient to prevent surrender. The ECtHR jurisprudence is clear that not every breach of the ECHR will justify refusal to extradite.⁴¹³ Sharpston notes that there is no equivalent dicta from the CJEU and thus draws on the case of *N.S.* where “issues of a similar nature arose”.⁴¹⁴ To this end both Courts are agreed that under Article 3 ECHR and Article 4 CFR, the Court must be satisfied that there are ‘substantial grounds for believing’ that there is a ‘real risk’ of a violation.

Advocate-General Sharpston clearly states that HRs must be considered by the E-MS when deciding whether to execute an EAW. She agrees with the ECtHR test of a real risk for Article 3. However she reformulates the test for Article 6 from requiring a ‘flagrant denial’ to whether the deficiency fundamentally destroys the trial as a whole. The standard for both Articles 6 and 5 is lowered to persuading the court of a well-founded breach with the fact that a past breach can be remedied almost nullifying it as a

⁴¹² Note the exception set out by the ECtHR in *Salah Sheekh* (n227) member of a minority clan in Somalia was sufficient, *N.A. v UK* (n403) being a Tamil Tiger was sufficient.

⁴¹³ See *Soering* (n177) and related case law.

⁴¹⁴ *Radu* (n158) Opinion of Advocate-General Sharpston, §§74-77

ground to resist surrender. Whilst the Opinion is not binding, it is advisory and states would do well to abide by the clear guidance.

6.7 To Conclude

The right set out under Article 3 ECHR and Article 4 CFR is absolute and there is no room for balancing it with the public interest. It creates negative and positive obligations for MSs. The negative obligations require states to simply not inflict treatment which is incompatible with Article 3. Positive obligations involve having in place preventative measures, and conduct investigations. It is not necessary for the threat of Article 3 prohibited treatment to stem from state actors, it can also flow from others, including private individuals (i.e.) the prison population.

Turning to arrest, Article 3 permits the use of force as long as the force is necessary and warranted in the circumstance (i.e.) violent resistance of arrest would warrant more force than an un-resisted one. An example of a positive obligation related to the EAW is to provide arrested and detained individuals with appropriate medical treatment, with failure to do so a potential violation of Article 3. These obligations are of equal applicability to the internal situations of the I-MS and E-MSs.

Detention raises another set of issues relevant to the EAW, in particular the conditions of detention, such as overcrowding and the cumulative impact of other conditions, and prison regimes notably strip searches and solitary confinement. The case law of the ECtHR, together with reports from the CPT and CAT highlight the fact that this is of concern across the EU. However the vast majority of arguments based on these conditions to resist surrender fail. They fail because of the requirement for the risk to be specific to the individual and not a general nature, together with the acceptance of assurances of special treatment for the surrendered individual. This is as it should be, but not so rigorous as to nullify the buffer protection offered by the E-MS. For example

if it is shown that an individual will be detained in a prison whose standards violate Article 3, surrender should be refused. If it is shown that there is a practice by the I-MS of not fulfilling assurances, surrender should likewise be refused.

Extradition and the EAW place these additional obligations on the E-MS to ensure that they are not sending an individual to face treatment contrary to Article 3. This extended responsibility was set out by the ECHR in *Soering* and reinforced by subsequent cases. Article 19(2) CFR codifies these decisions. There is an excessive burden on the individual to show beyond a reasonable doubt that there is a real risk he will suffer prohibited treatment on his return. The trend in recent judgments of both Courts shows an easing of this burden, requiring the state to also conduct an independent and rigorous scrutiny of the reality. In circumstances where the situation is unsatisfactory, assurances can be sought to protect the individual.

At the domestic level, the threshold that the severity of the treatment has to reach is also extremely high. It appears that there is a bizarre alchemy, requiring a higher threshold to be satisfied if the claims are made during extradition proceedings. This raised threshold is partly due to mutual trust that is said to exist, however it is also a result of the distortion of ECHR jurisprudence and confusion in relation to domestic levels. Whilst states are free to restrict what is acceptable treatment in the domestic context, they cannot lower minimum standards of protection set by the ECtHR. If the treatment would be prohibited by Article 3 if imposed internally then the same treatment will also be contrary to Article 3 if imposed externally in the I-MS.

Recent judgments in the field of asylum law are instructive as to the HRs obligations of states when implementing an EAW. Both *M.S.S.* and *N.S.* clearly state that international obligations (including Dublin II and the EAWFD) do not erase existing HRs obligations. Courts should not be concerned with the theoretical protection but rather with the

reality. Presumptions as to the HRs compliance of a state must be rebuttable and the burden is not entirely on the individual. These cases had the effect in England of realigning the overzealous application of MR. The line of cases reliant on the earlier ECtHR of *K.R.S.* and the requirement for “exceptional circumstances” was corrected following the *M.S.S.* judgment.

Logically, the *N.S.* judgment should automatically apply to other measures within the AFSJ, such as the EAWFD. In her Opinion in *Radu*, Advocate-General Sharpston corroborates assertions that the above asylum cases are analogous to the application of the EAWFD. She proposes a lower burden of proof for individuals making claims under Article 3 and also seeks to clarify that what is of concern in relation to Articles 5 and 6, is not a ‘flagrant denial’ but rather the impact on the trial as a whole. Despite this caselaw, the reality is that national judges will be reluctant to rock the proverbial MR boat until they are given a green light from one of the regional courts or they are able to rely on EU measures.

Chapter Seven: Family and Private Life

Engagement of the criminal justice system will inevitably involve an interference with the family and private life of individuals. Whether such interference amounts to a violation of Article 8 ECHR will depend on the circumstances of each individual case. The EAW undoubtedly interferes with an individual's Article 8 rights, however as a qualified right, interferences are permitted if they satisfy the stated requirements.

7.1 The Right

The right guaranteed under Article 8 has four dimensions as reflected in Article 7 of the CFR “private and family life, home and communications.” Consideration in relation to the EAW will be restricted to the first two aspects. Article 7 CFR has the same scope and meaning as Article 8 ECHR and the caselaw of the ECtHR on family life continues to instruct the CFR.⁴¹⁵

7.1.1 The Scope

The concept of ‘family’ under the ECHR has an autonomous meaning and is not restricted to families based on marriage, rather “a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means”.⁴¹⁶ It also encompasses other relationships such as between parent and child,⁴¹⁷ siblings⁴¹⁸ or grandparents and grandchildren.⁴¹⁹ Remote relationships may also fall under the private life sphere of Article 8.

⁴¹⁵ The case law of the EU on family law is vast and touches a widerange of topics. The key EU cases and their ECHR counterparts are considered in greate detail in a recent publication on asylum. See: N Mole, C Meredith and M Akhavan-Tabib, *Handbook on European law relating to asylum, borders and immigration*, Fundamental Rights Agency, 2013

⁴¹⁶ *X, Y and Z v UK*, 21830/93, Judgment 22.04.1997

⁴¹⁷ *Olsson v Sweden (No 1)*, 10465/83, Judgment 24 March 1988

⁴¹⁸ *Moustaquim v Belgium*, 12313/86, Judgment 18 February 1991

The private life sphere is not defined but fact specific. Having evolved on a case by case basis, it now covers a relatively broad range of issues including: moral and physical integrity;⁴²⁰ identity;⁴²¹ personal autonomy; sexual life; collection and access to personal data;⁴²² and protection of reputation.⁴²³ Essentially it protects the right of an individual to develop their relations with others and the outside world.

7.1.2 The Test

Having ascertained that the facts disclose a protected right under Article 8 and that there is (or would be) an interference with that right a three part test is applied in order to assess whether the interference equates to a violation.⁴²⁴ This is set out in Article 8 and the courts will ask themselves whether the interference is: “in accordance with the law”; in pursuit of a legitimate aim; and “necessary in a democratic society”, in other words proportionate to the legitimate aim.

The first part of the test simply ensures that the interference has a legal basis and that the relevant law is both accessible and foreseeable.⁴²⁵

The ‘legitimate aims’ are listed within the text of the article; namely “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

⁴¹⁹ *Marckx v Belgium*, 6833/74, Judgment 13.06.1979

⁴²⁰ This aspect of Article 8 has significant overlap with both Articles 3 and 5. For example the forceful administration of emetics to a suspected drug dealer fell within the scope of Article 8, but because of the severity of the treatment it was decided by the ECtHR under Article 3 (*Jalloh v Germany*, 54810/00, [GC] Judgment 11.07.2006).

⁴²¹ See *Chapman v UK* 27238/95, [GC] Judgment 18.01.2001

⁴²² For example *Murray v UK* (n682) information collected by the police; *S and Marper v UK* (30562/04, 30566/04, [GC] Judgment 4.12.2008) fingerprints, DNA profiles, etc; *Amman v Switzerland* (27798/95, [GC] Judgment 16.02.2000) interception of calls; *Peck v UK* (44647/98, Judgment 28.01.2003) images captured by CCTV.

⁴²³ See *Rotaru v Romania*, 28341/95, [GC] Judgment 4.05.2000

⁴²⁴ This is the same test which is applied to the rights guaranteed by Articles 8-11 ECHR.

⁴²⁵ See *Sunday Times v UK*, 6538/74, Judgment 26.04.1979. See also *Silver and Others v UK*, s 5947/72 and 6 others, Judgment 25.03.1983 (interference with the prisoner’s correspondence was based on internal and unpublished standing orders and circular instructions to prison governors from the Secretary of State for the Prison Service).

Whether a measure is necessary in a democratic society, the ECtHR has stated that “the notion of necessity implies that an interference corresponds to a pressing social need, and in particular, that it is proportionate to the legitimate aim being pursued”.⁴²⁶ Other questions that may be considered include whether there is an alternative less intrusive option, if this has been considered and if sufficient reasons have been provided for rejecting it. As part of the assessment the existence and application of procedural safeguards are also important in order to avoid abuse. Finally, thought will be given to whether the interference operates so as to “impair the very essence of the right”.

In the EAW context Article 8 is mainly applicable to the E-MS, including the obligation to take into account the circumstances and potential violations in the I-MS. The first two parts of the test are generally uncontroversial in terms of the EAW and will rarely raise any issues. The execution of an EAW request is based on the national implementing law and depending on the circumstances of the particular case the interference can fit under one or more of the legitimate aims listed in Article 8(2); extradition to face trial or serve a sentence is a justified interference provided it is in accordance with the law and is necessary in a democratic society in pursuit of a legitimate aim.

In relation to the EAW, issues will arise when the E-MS is determining the proportionality of any consequences of surrender on the individual’s family or private life. A balancing act is conducted between the compelling legitimate aims associated with extradition and the adverse impact on the individual. Particular weight is given to fulfillment of obligations flowing from international and bilateral extradition treaties/agreements, nevertheless the state must strive to protect, as far as possible, family or private life of individuals.

⁴²⁶ *Olsson* (n417)

The I-MS is subject to the same obligations to ensure that Article 8 rights are respected and form part of its decision-making.

7.2 Family Life

Proportionality refers to two aspects of the interference. Firstly whether means employed are proportionate to the ends sought; in other words not using ‘a sledgehammer to crack a nut’. Secondly whether a fair balance has been struck between the competing interests is usually between the individual and the community.

Absolute rights such as Article 3 ECHR involve no fair balance test, the real risk that an individual would be subjected to Article 3 prohibited treatment cannot be balanced with any competing interests no matter how undesirable a person or their conduct may be.⁴²⁷

On the other hand the fair balance principle is applied to qualified rights such as Article 8 ECHR. For example, in *Moustaquim*⁴²⁸ the deportation following criminal conviction was disproportionate for someone who had been in the country for 20 years since the age of 2. Whilst a similar outcome was found in *Beldjoudi v France*⁴²⁹ it was not so in *Boughanemi v France*.⁴³⁰ The distinguishing facts were the seriousness of the offence committed and his apparent lack of desire to be French and in *Benhebba v France*⁴³¹ it was because of the persistent commission of drug offences.

Following criticism of what appeared to be arbitrary decisions by the ECtHR, it set out criteria in *Boutlif*⁴³² subsequently developed in *Üner*⁴³³ and *Maslov*.⁴³⁴

In *Maslov* the ECtHR held that the imposition of a 10 year ban on a 16 year old who had lived for 10 years in Austria was disproportionate and thus in violation of Article 8.

⁴²⁷ See *Chahal* (n246) and *Soering* (n177)

⁴²⁸ (n418)

⁴²⁹ 12083/86, Judgment 26.03.1992

⁴³⁰ 22070/93, Judgment 24.04.1996

⁴³¹ 53441/99, Judgment 10.07.2003

⁴³² *Boutlif v Switzerland*, 54273/00, Judgment 2.08.2001

⁴³³ *Üner v the Netherlands*, 46410/99, Judgment 18.10.2006

⁴³⁴ *Maslov v Austria*, 1638/03, [GC] judgment 23.06.2008

The weight to be attached to particular criteria will be dependent on the particular circumstances of the case. In the present case the individual was young and had not established his own family life. In cases such as these the ECtHR stated that the relevant criteria are,

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the solidity of social, cultural and family ties with the host country and with the country of destination.⁴³⁵

Although the *Boutlif* criteria have been developed in relation to proposed expulsion of foreign nationals following conviction, they are of general applicability when assessing proportionality of an interference with Article 8 caused by an expulsion or extradition.⁴³⁶

In *Üner v the Netherlands* the Court confirmed the criteria set out in *Boutlif*, adding two further criteria: “the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination.”⁴³⁷

The margin of appreciation granted by the ECtHR in expulsion/surrender cases of minors is narrower than that for adults.

When deciding whether to surrender a court must have regard to the balancing of interests and the *Boutlif* criteria. It is this balancing act which means that not all interferences with a person’s private or family life will equate to a violation. On the

⁴³⁵ *ibid* §71

⁴³⁶ *Boutlif* (n432) §48. In addition to those listed in *Maslov*, *Boutlif* also listed are: the nationalities of those concerned; their family situation (including the length of marriage, whether they have any children); the seriousness of difficulties family members would face in the receiving country.

⁴³⁷ *Üner* (n433) §58

‘MR modified scales’, the obligation of states to respect treaty obligations (referring here to the EAWFD above the ECHR) and ensure that fugitives are brought to justice, weigh much more than rights of the individual.

7.2.1 Exceptionality: The UK Courts and Article 8

Given the importance placed on fulfilling the MR obligations, the EAWFD weighs in against the individual. As such the balancing needs to be re-calibrated to ensure that the individual’s rights are not nullified.

The application of Article 8 considerations by the UK courts illustrates the difficulties encountered by judges when trying to grapple with the competing interests of the individual’s rights and the desire to facilitate justice and fulfill treaty obligations.

Domestic and Foreign Cases

Firstly, the UK Courts have adopted a ‘domestic’ and ‘foreign’ case distinction. This is set out by Lord Bingham in *Ullah and Do*. ‘Domestic cases’ are “where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory.”⁴³⁸ These cases include family reunification cases.

In ‘foreign cases’ the claim is not that the state complained of will violate the rights of the applicant, but , “that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory.”⁴³⁹

Lord Bingham also refers to a third hybrid class,

The removal of a person from country A to country B may both violate his right to respect for his private and family life in country A and also violate

⁴³⁸ *Regina Ex Parte Ullah v Special Adjudicator and Do v Secretary of State for the Home Department* [2004] UKHL 26 §7

⁴³⁹ *ibid* §9

the same right by depriving him of family life or impeding his enjoyment of private life in country B.⁴⁴⁰

Cases involving family life are by their nature ‘domestic’, it is the act of deportation or extradition which breaks up the family and not the conditions in the receiving state.

Extradition cases fall within the ‘foreign’ classification when the act of surrendering an individual exposes the individual to a violation of their rights in the territory of the I-MS; for example in instances where there is a real risk of torture. However in extradition cases where other family members are involved, it is more likely to be considered a hybrid case.

The appeal in *Razgar*⁴⁴¹ was heard immediately after *Ullah and Do* and the House of Lords explicitly states that the opinions in the two judgments are to be read where relevant together. In *Razgar* Baroness Hale states that the distinction is important because in “a domestic case, the state must always act in a way which is compatible with the Convention rights. There is no threshold test related to the seriousness of the violation or the importance of the right involved.” In a foreign case this additional threshold exists, for example a ‘real risk’ or a ‘flagrant denial’. Lady Hale states that the hybrid cases described by Lord Bingham should remain domestic cases, in particular where there was strong social integration.

There is no threshold test of enormity or humanitarian affront. But the right to respect for private and family life, home and correspondence, which is protected by article 8, is a qualified right which may be interfered with if this is necessary in order to pursue a legitimate aim. What may happen in the foreign country is therefore relevant to the proportionality of the proposed expulsion.⁴⁴²

⁴⁴⁰ *ibid* §18

⁴⁴¹ *R v Secretary of State for the Home Department (Appellant) ex parte Razgar (FC) (Respondent)* [2004] UKHL 27 at §42

⁴⁴² *ibid* §43

The purpose of the threshold is to assist in the balancing act. The starting point is that extradition is to proceed unless evidence exists to the contrary. In order to tip the scales against extradition, the reasons need to be of a sufficiently serious nature.

Exceptionality

The word ‘exceptional’ can be found throughout the above cases, stating that exceptional circumstances need to be shown to prevent the breaking up of the family by the deportation or extradition. The reference to ‘exceptional circumstances’ flows from ECHR cases such as *Launder v UK* where it was stated that “it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State would be held to be an unjustified or disproportionate interference with the right to respect for family life.”⁴⁴³ In this case D lived in Hong Kong for 10 years and for several years outside the UK; there were no clear bars to the family either moving or visiting him in Hong Kong. Considering the facts of this case, subsequent cases have stretched the phrase “exceptional”. The phrase refers to the circumstantial interference which is out of the ordinary, rather than setting a high evidential burden or a threshold test.

The usefulness of the distinction between domestic and foreign is questioned by Laws LJ in *R (Bermingham)*, who regards the test to be applied in both instances as stringent, holding that extradition could only be resisted where a “wholly exceptional case” is shown.⁴⁴⁴

In *Huang v Secretary of State for the Home Department*⁴⁴⁵ Lord Bingham further clarifies the term ‘exceptional’. He states that the removal will be disproportionate if it

⁴⁴³ *Ewan Quayle Launder v UK*, 27279/95, Commission Decision 8.12.1997

⁴⁴⁴ *R (on the application of Bermingham and others) v Director of the Serious Fraud Office; Bermingham and others v Government of the United States of America* [2006] EWHC 200 (Admin) §115, 118. In the present case the court found that there was nothing exceptional about the personal circumstances of the defendants for extradition to be refused on proportionality grounds.

⁴⁴⁵ [2007] UKHL 11

“prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right” and continues to confirm that it is not a test of exceptionality. Whilst it is an expectation that only a small minority of cases will succeed with this argument, “was not purporting to lay down a legal test”.⁴⁴⁶

Jaso v Madrid Central Court No 2,⁴⁴⁷ was one of the first cases to apply the clarified Article 8 test in the context of the EAW. In this case, the district judge held that the case was not a case “of wholly exceptional circumstances which could be held to be an unjustified or disproportionate interference with their article 8 rights”.⁴⁴⁸ In *Jaso* the Divisional Court stated that “it is wrong to apply an exceptionality test...as a formula for proportionality”. Dyson LJ corrected this test, stating that in order for the interests of the individual to outweigh the “great weight...accorded to the legitimate aim of honouring extradition treaties... there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's art 8 rights.”⁴⁴⁹ This case did not concern a family life in the UK but rather private life. The complaint was that his private life would be interfered with because of the incommunicado detention he would be subjected to in Spain upon surrender.

So whilst the test is not of exceptionality, the threshold of the inference as a consequence of removal is nevertheless a high one. This was again confirmed by Lord Bingham in *Ullah and Do*,⁴⁵⁰ where he preferred the approach of the Immigration Appeal Tribunal in *Devaseelan v Secretary of State for the Home Department*,

The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will

⁴⁴⁶ *ibid* §20. Exceptionality in this context is subsequently referred to by Sedley LJ in *AG (Eritrea) v Secretary of State for the Home Department* [2007] EWCA Civ 801 as the “practical effect” and not the yardstick.

⁴⁴⁷ [2007] EWHC 2983 (Admin)

⁴⁴⁸ *ibid* §56 citing the judgment of the District Court §16.

⁴⁴⁹ *ibid* §57

⁴⁵⁰ (n438)

breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state.⁴⁵¹

In the EAW context the question to be posed is whether surrender will nullify or completely deny the individual's right to family life. It patently does on at least a temporary (immediate) time frame when the person is surrendered. These issues are further demonstrated in the case of *Norris*.⁴⁵²

The *Norris* case concerned the extradition of the appellants to the USA, but is of equal application to the operation of the EAW. The House of Lords set out a test which has since been applied by courts to EAW cases. The test laid down by Lord Philips is that "the interference with HRs will have to be extremely serious if the public interest is to be outweighed"⁴⁵³ and that "only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it servers."⁴⁵⁴

The first step for a judge is to consider the offence to ensure that the minimum sentence requirements are satisfied. The judge then considers whether any of the listed statutory bars apply. HRs are indirectly listed within these barriers, (i.e.) unjust or oppressive, passage of time, etc. Once these two steps are passed, the court will consider compatibility with the ECHR, as confirmed in numerous cases, this is a fact specific exercise. It is at this point where the court will assess whether "there are any relevant features that are unusually or exceptionally compelling...[if]... the nature or extent of the interference with article 8 rights is exceptionally serious, careful consideration must be given to whether such interference is justified."⁴⁵⁵

⁴⁵¹ [2003] Imm AR 1, §111

⁴⁵² *Norris v Government of United States of America* [2010] UKSC 9

⁴⁵³ *ibid* §55

⁴⁵⁴ *ibid* §82 In spite of stating that "exceptional circumstances" is not the legal test, reliance is still confusingly placed on the word exceptional by almost all judges.

⁴⁵⁵ *ibid* §62

The gravity of the offence is relevant to the issue of proportionality. In particular if it is “at the bottom of the scale of gravity, this is capable of being one of a combination of features that may render extradition a disproportionate interference with human rights.”⁴⁵⁶

Because the presumption is connected to MR; the threshold is higher for establishing that HRs of the individual will be violated if surrendered to another MS. However as shown in relation to Article 3, recent UK cases show an easing of the strict threshold of a Constitutional anomaly or revolutionary overthrow of government. It may now be possible or easier in the UK to resist surrender on the HRs ground found in Section 21 of the EA 2003.

7.3 Alternatives to interference with Art 8

Whilst it is accepted that imprisonment will always interfere with Article 8, incarceration in a different country away from family substantially increases the interference. For example it makes visitation difficult if not impossible. This issue also relates to the fact that the imprisonment option cannot be viewed in isolation from other options which would guarantee the presence of the individual at trial or sentencing. The Article 8 rights of the family unit can also not be ignored; where there is room for such considerations, the balance concerns not only the impact on the extraditee but also the rights of innocent others. As confirmed in *Beoku-Betts v Secretary of State for the Home Department*⁴⁵⁷ the court is to have regard to the family unit as a whole and each member individually.⁴⁵⁸

The UK Supreme Court in *Norris*, makes it clear that the preservation of an effective extradition system is both an important and weighty factor which “in almost every

⁴⁵⁶ *ibid* §63

⁴⁵⁷ [2008] UKHL 39

⁴⁵⁸ *ibid* §64

circumstance outweigh any article 8 argument.”⁴⁵⁹ The Supreme Court dismisses the possibility of the UK taking over the prosecution. The Court relies on a line of recent authorities which rejected arguments that the extraditee should be prosecuted in the UK. It stated that extradition proceedings were not the appropriate

“occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country’s treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country.”⁴⁶⁰

This stance may however be explained by the fact that a forum bar did not at the time exist in the EA.

The ECtHR jurisprudence states that where there are viable alternatives which would be less intrusive on the individual’s family or private life they should be considered and the Court must consider it and give compelling reasons for dismissing it beyond maintaining good relations with the requesting state. They will also have a bearing on the proportionality of surrender.

In *Hatton and others v UK* the ECtHR affirmed that States were “required to minimise, as far as possible, interference with Article 8 rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights.”⁴⁶¹ Less intrusive measures must not be dismissed too quickly and without first being given a proper consideration.⁴⁶² It is “for the respondent State to

⁴⁵⁹ *ibid* §136 per Lord Kerr

⁴⁶⁰ *ibid* §§66-7

⁴⁶¹ 36022/97, [GC] Judgment 8.07.2003, §86 (citing §97 of the Chamber’s judgment)

⁴⁶² *A.D. & O.D. v. UK*, 28680/06, Judgment 16.03.2010 §89

establish that a careful assessment of the [...] possible alternatives to taking the child into public care was carried out prior to the implementation of such a measure.”⁴⁶³

Within the EAW system there are a number of alternatives to surrender available to MSs contained both within the EAWFD and also in other measures.

7.3.1 Option One: Where Wanted for Prosecution

The presumption in favour of surrender respects not only the principle of MR but also relates to reciprocity considerations. The EAWFD provides an acceptable alternative to simple surrender which leaves untarnished MR. Where an individual is wanted for prosecution the E-MS has options to minimize interference with Article 8 rights including surrender conditional on the individual would be returned to serve any sentence of imprisonment.

Under Article 5(3), where an individual is wanted for prosecution, surrender can be made conditional on the return of the individual to the E-MS at the conclusion of the criminal proceedings. If the individual is found guilty, the E-MS can undertake to execute any sentence handed down. In both circumstances justice is served in respect of the competing interests. The individual’s Article 8 right is not unnecessarily interfered with whilst not ‘escaping’ justice and requiring no judgment to be drawn on another MS’s system.

As an optional ground, this provision has been implemented to varying degrees by MSs. Whilst 18 MSs have implemented this requirement they have done so with an array of conditions, restrictions and requirements. For example, it has been transposed as a

⁴⁶³ *Moser v Austria* 12643/02, Judgment 21.09.2006 §66 citing *P., C. and S. v. UK*, 56547/00, Judgment 16/07/2002, §116, and *K. and T. v. Finland*, 25702/94, [GC] Judgment 12.07.2001, §166

mandatory ground for nationals by 7 States and as an optional ground by 11 MSs for ‘integrated residents’, residents who request it or persons staying in MSs.⁴⁶⁴

This provision provides judges with a tool to protect the individual whilst not appearing to make judgment calls on the I-MS’s prisons. It is an option which protects the integrity of MR whilst also dealing with HRs concerns of national judges.

7.3.2 Option Two: Where wanted to serve sentence

Where the EAW is for the purposes of serving a sentence, the viable alternatives include transferring the prisoner under one of the existing measures or under Article 4(6) the E-MS can undertake to execute any sentence passed by the I-MS instead of surrendering them. This is also similar to the operation of Art 3(2) Dublin II, for example the *M.S.S.* and *N.S.* cases in addition to the extraterritorial HRs obligations also rely on Article 3(2) which provides a mechanism enabling MSs to process an individual’s asylum application instead of removing them to the first country of entry.

This too has been implemented to varying degrees by MSs; 7 MSs have transposed Article 4(6) as a mandatory ground with 6 reserving it only for their nationals. 11 have implemented it as an optional ground with 3 reserving this ground for their nationals alone and others extend the right to long-term residents.⁴⁶⁵

In relation to Articles 4(6) and 5(3) it should be noted that the *Lopes Da Silva Jorge* case concerned the French implementing law which limited the application of Article 4(6) to nationals. The CJEU held that MSs cannot under EU law restrict application of the ground to its own nationals. Amendments will thus need to be made by all MSs whose implementing law includes such discriminatory clauses.

⁴⁶⁴ Commission, Commission Staff Working Document, *Annex to the Report From The Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2005) 63 final, 23.02.2005

⁴⁶⁵ *ibid*

In the UK, the Parliamentary Human Rights Committee recommended that both Article 4(6) and 5(3) be implemented into the EA 2003 to greatly reduce the impact on Article 8 rights;⁴⁶⁶ a recommendation the UK government has yet to follow. Although the Scott Baker Report⁴⁶⁷ recommends amending the EA to allow judges to refuse surrender where the convicted person is requested to serve a sentence of less than 12 months; it found that implementation of these specific provisions was not necessary. The view was that the Repatriation of Prisoners Act 1984 (RPA) provided similar avenues for prisoners to be returned to the UK to serve their sentence and when coupled with the Framework 2008/909/JHA on mutual recognition of custodial sentences⁴⁶⁸ was sufficient. Given that the RPA option is in essence domestic grounds, questions could be asked about the negative impact on MR. The RPA requires a ‘warrant for transfer’ to be issued for the process to be engaged, it is not an automatic procedure. It is an external process and disconnected from the EAW. As such it cannot form part of the balancing act when deciding whether to surrender, unless the UK undertakes an assurance that it will issue such a transfer warrant upon sentencing by the I-MS. That said, the RPA contains some good safeguards, including the requirement for the person to consent to the transfer and a process for the revocation of a warrant. These could be incorporated into the provision implementing Article 4(6).

Transfer of Prisoners

There were a number of mechanisms operating within the EU regulating the transfer of prisoners between states, including the Council of Europe Convention on the Transfer

⁴⁶⁶ House of Lords and House of Commons Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, 22.06.2011 §§181-2

⁴⁶⁷ Sir Scott Baker, David Perry and Anand Doobay, *A Review Of The United Kingdom's Extradition Arrangements*, presented to the Home Secretary on 30.09.2011 (Scott Baker Report)

⁴⁶⁸ Article 26, Council Framework Decision 2008/909/JHA of 27 November 2008 *on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving the deprivation of liberty for the purposes of their enforcement in the European Union, deadline for implementation 5.12.2012* (Prisoner Transfer FD)

of Sentenced Persons.⁴⁶⁹ In their application between EU MSs, these have now been replaced by Prisoner Transfer FD whose stated purpose is “facilitating the social rehabilitation of the sentenced person”.⁴⁷⁰ To this end the I-MS is invited to take into account factors such as the person’s attachment to the E-MS, “family, linguistic, cultural, social or economic and other links”. These are factors which would also be taken into account if Articles 4(6) and 5(3) were implemented by the UK, but which in any case are relevant when Article 8 ECHR is engaged.

As a purely procedural matter, upon transfer the penalty imposed will remain the same, however conditions for early release can be those of the state where the sentence is being served.⁴⁷¹

Beyond the purely humanitarian considerations, the housing of prisoners is expensive, placing a substantial financial burden on states. For this reason it is preferable, if possible, for MSs to transfer prisoners to other MSs. Under the Prisoner Transfer FD, the costs are borne by the E-MS.⁴⁷²

The reasons for having such transfer systems are important and have changed over time. Currently it is powered by motivations of states rather than reasons of the past, namely the individual’s ability to serve at home. Nevertheless, the Prisoner Transfer FD can provide a useful support mechanism to surrender under the EAW, by assisting with conditional surrender or as a mechanism engaged upon conviction and sentencing.

⁴⁶⁹ Council of Europe, Treaty No.112, entered into force 1.07.1985.

⁴⁷⁰ Prisoner Transfer FD (n468), Recital 9 and Article 3(1)

⁴⁷¹ See *Giza v Poland*, 1997/11, Decision 23.10.2012. In this case the applicant had been surrendered under an EAW to Belgium, on the condition that he would be returned to Poland to serve his sentence. Had he remained in Belgium he would be eligible to apply for conditional release after having served $\frac{1}{3}$ of the total term of imprisonment; in Poland he had to serve $\frac{1}{2}$ of his term. The Court held there was no violation of either Article 5 or 7.

⁴⁷² Prisoner Transfer FD (n468), Article 24 (except the costs of transfer). Within the EU it is arguable that the financial burden of improving prison conditions does not lie with individual Member States, but is rather in the EU’s collective long-term interests.

7.3.3 Option Three: Forum Bar

Article 4(7)(a) EAWFD provides for a forum bar to surrender where the alleged offence was committed “in whole or in part in the territory of the executing Member State.”

Such a ground could increase protection of HRs, providing a less intrusive interference and make the preparation of a defence easier. Victim rights would still be considered since a determination would be made on a case by case basis.⁴⁷³

This is one optional ground which the UK did not initially implement. Although a forum bar was later introduced into the EA 2003 by the Police and Justice Act 2006⁴⁷⁴ providing a ground for the court to refuse surrender. The forum bar would operate where “a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom”; and “in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.”

In their Extradition review, the Joint Parliamentary Committee on Human Rights agreed with many witnesses calling for the forum bar to be brought into force.⁴⁷⁵ The impact on MR would be slight since “a number of other European jurisdictions require forum to be considered”.⁴⁷⁶

On the other hand the Scott Baker Report⁴⁷⁷ reaches a different conclusion that such a bar is not required and issues could be adequately dealt with by guidelines for prosecution decisions.⁴⁷⁸ The view is that prosecutors are better placed than judges to

⁴⁷³ For the full consideration see *Extradition Review* (n466) §§89-101

⁴⁷⁴ Para 5 Schedule 13

⁴⁷⁵ *Extradition Review* (n466) §90 “These amendments were incorporated in the legislation alongside an additional clause that required a resolution of both Houses of Parliament to bring the amendments into force. This has never happened.”

⁴⁷⁶ *Extradition Review* (n466) §97, evidence of the Law Society.

⁴⁷⁷ *Scott Baker Report* (n467), 205-230

⁴⁷⁸ The CPS published interim guidelines to prosecutors on the handling of cases where the jurisdiction to prosecute is shared by prosecuting authorities here and overseas. The guidelines had immediate effect, but were the subject of review after a consultation period of three months, which concluded on 31.01.2013.

determine forum, coupled with the disadvantage of possible delays and the fact that the District Judges could not find a case decided to date which would have benefited from a forum bar. With due respect the grounds are not sufficiently compelling; just because no case has existed in the past, it does not mean that a case will never exist. In terms of potential delay this will be acceptable when serving the interests of justice and more importantly a forum bar is envisaged and permitted by the EAWFD and thus the negative impact on the EAW procedure would appear to be exaggerated. Additionally, there is nothing wrong with providing a double barreled protection by judges and prosecutors. The report itself acknowledges the fact that the forum bar is a ground for refusing surrender and not an order to prosecutors. When considering the ‘interests of justice’ test, judges will take into account any decision of the prosecutors.

In the Government’s response to the Scott Baker Report,⁴⁷⁹ the Home Secretary announced that the forum bar would be introduced but legislated “afresh for a forum bar which will better balance the safeguards for defendants and delays to the extradition process which were predicted by Sir Scott Baker”.⁴⁸⁰

7.3.4 ESO

Another area of concern is the pre-trial period between surrender and trial. As set out above, bail is often difficult to obtain for ‘foreign nationals’. This issue of bail together with the usual immediate surrender leads to a heightened interference with the person’s family and private life; an interference for which the ESO provides a viable alternative.

An aim of the ESO measure is to minimise the inference with Article 8 beyond the usual consequences of imprisonment, in addition to the right to liberty and presumption

⁴⁷⁹ The Government Response to Sir Scott Baker’s Review of the United Kingdom’s Extradition Arrangements, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty October 2012, Cm 8458

⁴⁸⁰ The Crime and Courts Act 2013 received Royal assent 25.04.2013, Schedule 20 of which introduces a forum bar in both EAW and extradition cases. See Annex 7 for full text.

of innocence.⁴⁸¹ However the ESO not only targets the cost to an individual (family life and impact on employment) but also the cost of pre-trial detention to MSs. From the available figures, the average percentage of pre-trial detainees across the EU is 24.7% and the average of non-national prisoners (including post-trial) is 24.9%.⁴⁸²

Ljungquist recognizes the similarities between MSs, namely the applicable fundamental principles, but he also notes the key differences not covered by existing international measures. These include thresholds for pre-trial detention in terms of when it will be used and its maximum length.⁴⁸³ There are also limits to the ECHR, which was not drafted with “cross-border cases relating to mutual recognition of non-custodial pre-trial supervision measures”⁴⁸⁴ in mind. Thus there exists a need for something beyond the ECHR to ensure complete protection.

The ESO⁴⁸⁵ is far from a panacea for prison overcrowding or lengthy periods of pre-trial detention. Like the EAWFD this also requires flanking measures in order to be fully effective. These include raising awareness amongst MSs of alternatives to pre-trial detention from electronic tagging, to the more invasive further harmonization of minimum standards such as maximum pre-trial detention periods. Nevertheless it is a positive step forward in fulfilling HRs obligations and providing the protection required in cross-border proceedings. It also provides a viable alternative for MSs to take into account when assessing the proportionality of Article 8.

The E-MS therefore has a number of alternatives to unconditional surrender set out in the EAWFD itself. In addition to the forum bar and the option to take over the prosecution, as discussed above the E-MS can also undertake to execute a sentence. The

⁴⁸¹ ESOFD (n286), Recitals 4 and 5.

⁴⁸² Figures obtained from the International Centre for Prison Studies <http://www.prisonstudies.org/> accessed on 10.05.2012. See Annex 4 for a consolidated table created by the author from these figures.

⁴⁸³ Thomas Ljungquist, *Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures in the European Union*, Rev.Int'l Dr.Penal, (2006) Vol.66, 170-175

⁴⁸⁴ *ibid*, 172

⁴⁸⁵ See Annex 8 for key characteristics.

above three provisions work to protect the individual and to also promote cooperation between MSs together with other measures such as pre-trial the ESO and post-sentencing the Prison Transfer FD.

7.3.5 Rehabilitation and Reintegration

MR which is part and parcel of the EAWFD in practice leads to the breakup of family units and the interference with private lives. The obligation to fulfill, coupled with the high thresholds mean that “family life” will almost always play second fiddle. Whilst in most instances this poses no problem, cases should be assessed on their own merits, taking into account all factors but also allowing these factors to trump treaty obligations when appropriate.

One of the aims behind the ESO, the transfer of prisoner measures and the related EAW provisions as well as a reason for having a forum bar, is the encouragement for MSs to make use of alternatives to custody and to facilitate an individual’s interest to remain in their natural environment. The consequence of this is the positive impact on the rehabilitation and reintegration of the individual back into the EU society.

“Spending many years in prison may be a factor leading to desocialisation as it often destroys prisoners’ ties with their families, friends and the rest of society”,⁴⁸⁶ this is further aggravated if the family is in another country. The Parliamentary Assembly recommends that MSs ensure social reintegration is part of their prison policy, stating that this “is an important factor when it comes to assessing the functioning of democracy in Council of Europe member states.” It notes that failure to do this leads to high levels of reoffending because a several causes including “socialisation to prison culture; lack of family support; lack of education and vocational training; and social prejudices”. This recommendation is in part based on the Report by the Social, Health

⁴⁸⁶ Council of Europe, Parliamentary Assembly, *Recommendation 1741 (2006)1 on Social reintegration of prisoners*, adopted by the Assembly on 11.04.2006 (11th Sitting)

and Family Affairs Committee.⁴⁸⁷ The Committee stresses that family support “is also a very important factor in prisoners’ desire to return to a normal life upon release” and that in addition to “providing families with material and psychological support, efforts should be made to avoid geographical separation”.⁴⁸⁸

The ECtHR has also recognised the importance of this. In *Slivenko* it noted that “the network of personal, social and economic relations that make up the private life of every human being”;⁴⁸⁹ this is also reflected in the jurisprudence of the CJEU. In *Tsakourides* the Advocate-General Bot states that social integration and rehabilitation are “indissociable from the concept of human dignity” and for this reason he was of the opinion that “it belongs to the family of general principles of Union law”.⁴⁹⁰

It is evident that the long-term consideration of facilitating and easing the individual’s rehabilitation and related social reintegration, is an important factor for the courts of the E-MS to weigh up when considering viable alternatives to surrender.

Contact and visitation by ‘family members’ plays a key role in rehabilitation. In *Messina* the ECtHR has held that prison authorities are to facilitate contact with close family, even though there was no violation in this mafia’s case when restricted to 2 visits per month with his wife and daughter.⁴⁹¹ In *Boyle and Rice v UK*,⁴⁹² the ECtHR held that a degree of discretion must be left to the national authorities when regulating contact. However in *Lavents*, where an absolute ban on visits by his wife and daughter was imposed this was found to be disproportionate and therefore a violation of Article

⁴⁸⁷ Council of Europe, Social, Health and Family Affairs Committee, *Report on Social reintegration of prisoners*, Doc. 10838, 7.02.2006

⁴⁸⁸ *ibid* §17, 19

⁴⁸⁹ *Slivenko v Latvia*, 48321/99, Judgment 9.10.2003 §96

⁴⁹⁰ Case C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR I-11979, Advocate-General Opinion, §50

⁴⁹¹ *Messina v Italy (No 2)*, 25498/94, Judgment 28.09.2000

⁴⁹² 9659/82 and 9658/82, Judgment 27.04.1988

8.⁴⁹³ So once again the number of visits is a balancing act depending on the individual circumstances. Visitation must be facilitated where a family's breadwinner is incarcerated in a different country where visitation would be impossible. Thus when considering whether to surrender, states should have in mind the impact on the family and if there are viable alternatives such as conditional surrender or transfer.

Rehabilitation and reintegration are part of any functioning criminal justice system and serve the public good by reducing the likelihood of re-offending. This boosts the importance of taking family life into account when surrendered.

7.4 EU Citizens

Depending on the nationality of the individual and their family members different factors will come into play when expelling or surrendering an individual. The rights of legal residents within the EU can be viewed as a ladder; at the top step are EU citizens and at the bottom are third country nationals who have no connection to an EU citizen. Depending on the particular circumstances of the individual they can either go up or down a step. This section does not profess to be an authoritative consideration of the rights under the Citizens Directive or of the relationship between the EAW and the Directive – such indepth consideration is beyond the scope of this thesis. What this sections seeks to do is highlight the lack of joined up thinking that occurs at the EU level and also to emphasise that the rights set out in both the Treaty and the Citizens Directive need to be taken into account in the measures of both by the EU and Member States.⁴⁹⁴

⁴⁹³ *Lavents v Latvia*, 58442/00, Judgment 28.11.2002

⁴⁹⁴ Amongst other cases, see Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform*, (Grand Chamber) of 25 July

7.4.1 The Key Rights

The expulsion of EU citizens by MSs is set out in both the Treaty and the Citizens Directive.⁴⁹⁵ Articles 20 and 21 TFEU confer EU citizenship on nationals of MSs, thereby giving them the right to move freely within the territory of the EU. This right is both expanded and subject to limitations and conditions in EU measures adopted to give effect to them.

The Citizens Directive sets out the rights of EU citizens together with the resident rights of their family members or dependents. It aims to facilitate and strengthen the individual's right to move freely within the EU and "establishes a system of protection against expulsion measures which are based on the level of integration".⁴⁹⁶ Protection against expulsion increases incrementally with the level of integration. In terms of protection against disproportionate expulsion or exclusion, it sets out an exhaustive list of grounds together with an expulsion scale.

Article 27 sets out the grounds for restricting "the freedom of movement and residence of Union citizens and their family members, irrespective of nationality" these are "public policy, public security or public health". Restrictions are only justified when one of these grounds exist and where the individual represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

After 5 years of continuous lawful residence in the host MS, an EU citizen and their family members can acquire permanent residence in accordance with Article 16. The residence rights of family members are acquired regardless of the nationality of the family members, they are reliant on the exercise of a treaty right by the EU citizen. Once permanent residence is obtained, Article 28(2) states that an individual with permanent residence cannot be expelled "except on serious grounds of public policy or

⁴⁹⁵ Citizens Directive (n46)

⁴⁹⁶ *Tsakouridis* (n490) §24-25 citing recitals 23 and 24 of the Citizens Directive.

public security”. Article 28(2) requires states to show that the grounds are ‘serious’ above and beyond the ‘serious threat’ threshold required for short-term residents. For those who have resided for 10 years and minors the state will need to show “imperative grounds of public policy” in order to justify their expulsion under Article 28(3). In *Tsakouridis*, the CJEU has clarified that this means “of a particularly high degree of seriousness”.⁴⁹⁷ In assessing a decision to expel, the CJEU states that it can only be justified if given the “exceptional seriousness of the threat”, it is necessary and no less intrusive means are available having regard to the “serious negative consequences” upon an individual who has become “genuinely integrated”.⁴⁹⁸

The CJEU went on to say that a balance must be struck between the exceptional threat to the public and the effect on the “social rehabilitation” of the individual which is viewed as being in the interests of both them and the EU.⁴⁹⁹

It is interesting to note that the criteria set out in the Citizens Directive to assess the proportionality of an expulsion are similar to those laid down by the ECtHR in *Boutlif* and subsequent cases.

Article 28(1) states,

Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

Any measure which seeks to remove an individual must take into account their fundamental rights, the CJEU highlights as of particular relevance Article 8 ECHR and

⁴⁹⁷ *ibid* §41

⁴⁹⁸ *ibid* §49

⁴⁹⁹ *ibid* §50

Article 7 CFR.⁵⁰⁰ The CJEU has previously identified the ECHR as being of “special significance” in the general principles of EU law.⁵⁰¹

The obligation for MSs to give careful and genuine consideration to the circumstances of an individual before surrendering them, flows not only from HRs but as we can see from EU law as well. As set out above consideration of alternative means is part of the balancing act, for those at the top of the ladder their right to remain in the E-MS is capable of overriding the interests of enforcing an EAW. In such instances, the reasoning of the MS for rejecting viable alternatives will need to be exceptional, “the level of justification required when assessing proportionality must be high”.⁵⁰²

Alternatives of particular relevance include the ability to execute a sentence or conditional surrender on the basis that the individual would be returned to serve their sentence. On this basis an individual could have the right to insist that he can return at the conclusion of trial or his sentence.

Whilst the reasons for expelling someone should be based on their individual conduct, others within the ‘family unit’ of the EU citizen must also be included in the equation. It will not only be a choice of whether they stay in the surrendering State without the surrendered person, but it may be that they have no free standing right to remain in the country and thus upon surrender of the individual the family members are also expelled. Individuals have a lot to lose and therefore MSs should not be too quick to surrender.

Imprisonment does not come within the definition of “exercising treaty rights” which is required in order for TCN and family members to be entitled to join an EU citizen.

⁵⁰⁰ *ibid.* See also Sonia Morano-Foadi and Stelios Andreadasaki, *The convergence of the European legal system in the treatment of third country nationals in Europe: the ECJ and ECtHR jurisprudence*, EJIL, (2011) 22(4), 1071-1088, 1078 which highlights a number of other CJEU cases which emphasise the obligation of Member State authorities to take into account the right to family and private life.

⁵⁰¹ C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [1991] ECR I-02925 (ERT)

⁵⁰² *ibid* §§84-92

Furthermore a person imprisoned is not considered a ‘worker’. In the UK the ‘right to reside’ test will mean that their family will also lose their entitlement to social assistance.⁵⁰³ Furthermore, in relation to third country nationals, periods of time in prison do not count towards the calculation of days necessary to acquire increased rights in the host MS.⁵⁰⁴ This should be encouraging news to MSs, since allowing a third country national to serve their sentence in the country where they were residing with their family, does not help them gain any further benefits in that state.

However, serving a prison term cannot be classified as the exercise of a treaty right, it cannot automatically take rights away. The cases of *Zambrano*⁵⁰⁵ and *Dereci*⁵⁰⁶ make it clear that citizenship is not based on the exercise of a treaty right but rather a fundamental right including the right to reside. Mole⁵⁰⁷ believes that when surrendering an individual under an EAW, it is arguable that Article 16(3) Citizens Directive should be applied; otherwise the presumption of innocence would be violated. Article 16 governs the rights of Union citizens who having legally resided for a continuous period of 5 years in a MS to acquire the right of permanent residence (this right also applies to third country national family members who legal resided with a Union citizen). Article 16(3) states that the ‘continuity of residence’ cannot be effected “by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for” a list of reasons (excluding to stand trial). This is a compelling argument. Pre-trial detention in some MSs can last for upwards of 6 months with the possibility that the case is dismissed or an individual is acquitted. An individual and their family members should not be punished for premature issuance of an EAW or a sub-standard investigation.

⁵⁰³ The Commission has started infringement proceedings against the UK in relation to its ‘right to reside’ test in relation to social benefits.

⁵⁰⁴ See the conjoined cases of *Caesar Carvalho v Secretary of State for the Home Department* and *Secretary of State for the Home Department v Omar Abdullah Omar* [2010] EWCA Civ 1406 at §47

⁵⁰⁵ C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-01177, see also the Opinion of Advocate-General Sharpston in *Zambrano*.

⁵⁰⁶ Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres*, [2011] ECR 00000

⁵⁰⁷ Nuala Mole, Founder of the AIRE, this view was exchanged during an informal discussion with the author in February 2013.

When states determine that it is appropriate to reduce procedural steps, they also need to compensate for such cuts, by ensuring that the new procedures run smoothly with other elements of the EU *acquis* without unintentionally reducing rights in other spheres.

These are factors which should be considered when assessing the proportionality of surrender; in particular where the offence concerned is minor and where alternatives, such as the payment of a financial penalty, are available.

As set out above the EAWFD itself provides alternatives. The implementation of the EAWFD is left to the MSs to determine, provided that they fulfill the objectives of the EAWFD. For this reason the CJEU showed flexibility in their adjudication of the Dutch implementation of Article 4(6) EAWFD in *Wolzenburg*.⁵⁰⁸ Mr Wolzenburg (a German national) had been lawfully residing in the Netherlands for 3 years when he was arrested pursuant to a German EAW requesting his return to serve a suspended sentence which had been revoked. He had been lawfully resident in Holland for 3 years when arrested. The issue before the CJEU was whether the Dutch national law implementing the EAWFD, was contrary to the non-discrimination provision of Art 12 EC Treaty. The Dutch law required nationals of another MS to have been lawfully residing in the Netherlands for a period of at least 5 years and in possession of a residence permit of indefinite duration, before it would consider opting to execute the custodial sentence itself.

It concluded that where a MS had not placed additional criteria it was to follow the criteria as set out by the CJEU in *Kozłowski*, which requires an overall assessment of a person's circumstances, are to be applied. However MSs are free to place additional criteria on the application of Article 4(6) EAWFD, holding that 5 years residence was not excessive and in line with other EU law, in particular the Citizen's Directive. A

⁵⁰⁸ *Wolzenburg* (n128)

closer look at the Citizen's Directive reveals that the requirement of 5 years is for obtaining 'permanent residence' whereas Article 4(6) EAWFD applies to a person simply 'residing' or 'staying' in the E-MS. There is no reference to permanence of residence in the EAWFD and certainly 'staying' requires less formalities than for 'residence'. Thus the question is whether the Dutch law imposing on non-nationals a requirement of 5 years residency is in the true spirit of the EAWFD.

Whilst it is accepted that the central aim of the EAWFD is to facilitate the cross-border implementation of judicial decisions; the EAWFD falls within the AFSJ and as such must not only serve the interests of security but also of freedom and justice. In so doing, MSs must ensure that any additional criteria should not restrict further the rights of individuals.

In addition it was clear that the Citizens Directive 2004/38 does not require a Union citizen who has acquired a right of permanent residence by virtue of Art 16(1) to apply or hold for a residence permit of indefinite duration. Under Art 4(6) FD 2002/584 a MS cannot therefore in addition to the duration of residence in that MS also require supplementary administrative requirements such as possession of a residence permit of indefinite duration.

Marguery⁵⁰⁹ highlights one other issue dealt with by the CJEU in *Wolzenburg* the acceptability of discrimination between a MS's own nationals and non-nationals. Article 12 EC Treaty (now Article 18 TFEU), clearly prohibits such discrimination. This prohibition against discrimination on the basis of nationality is echoed in Article 21(2) of the CFR. This prohibition is not however absolute and can be restricted under certain circumstances. In *Wolzenburg* it was accepted that the differentiation between Dutch

⁵⁰⁹ Tony Marguery, *EU Citizenship and the European Arrest Warrant: The Same Rights for All?* Merkourios (2011) Volume 27 Issue 73, 84-91

nationals and non-nationals was in the pursuit of a legitimate aim, namely that of reintegration of the convicted person, and proportionate.

The Advocate-General Bot in this case disagreed with the requirement for non-nationals of 5 years residence. He was of the opinion that the duration of residence was only one factor to be taken into account together with the individual's other personal circumstances which indicated the level of integration into the E-MS. The conclusive factor is not the duration of residence but whether the individual's connections "appear to make execution of the sentence in the State necessary in order to facilitate his reintegration."⁵¹⁰ This view would appear to be more in line with the ECtHR jurisprudence.

The EAW needs to be implemented respecting the rights of family members to ensure that they are not punished for the acts of another. The right to family life is not absolute and can be interfered with in circumstances envisaged by the EAWFD; as such surrender cannot be refused simply because there would be an interference with this right. However, any interference needs to be proportionate and in certain situations MSs will be required to make use of alternatives which would allow a person to serve their sentence in the same country as their family or ensuring that the sentence imposed is appropriate in all the circumstances.

7.5 Children

Following on from consideration of how the EAW impacts on family life, children will be amongst those who fall within the 'collateral damage' head. When considering whether to surrender, judges should have in mind the effect on any children involved.

⁵¹⁰ *Wolzenburg* (n128)

7.5.1 Primary consideration

Despite the fact that there is no specific mention of the “best interests of the child” in the text of Article 8, the ECtHR has read it into its jurisprudence as a primary consideration when assessing interferences with the right to family life. Separation of mother and child will engage Article 8 and needs to be necessary in a democratic society,⁵¹¹ it is “an interference of a very serious order to split up a family”.⁵¹² *K and T v Finland* concerned a mother with a long history of mental illness, having given birth in prison the baby was immediately taken away at delivery. The ECtHR held that there had been a violation of Article 8 because of the authorities’ failure to take steps towards reunification. It also considered the importance of genuinely taking the less intrusive measure available.⁵¹³ From its jurisprudence it is clear that it considers the child’s best interest a primary consideration which must prevail in any balancing act.⁵¹⁴

In reaching its decisions, the ECtHR has regard to Article 3(1) of the UN Convention on the Rights of the Child (CRC). This clearly states that “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Of relevance to the EAW is that Article 24 of the CFR on the rights of the child replicates Articles 3, 9, 12 and 13 of the CRC. The CJEU has also confirmed the primacy of the child’s rights under both Article 25 and 7 of the CFR. The best way to

⁵¹¹ *Togher v UK* 28555/95, Commission Report 25.10.1999 c/f *Kleuver v Norway*, 45837/99, Decision 30.04.2002

⁵¹² *Olsson* (n417) §72

⁵¹³ *K. and T.* (n463); see also *P.C. and S.* (n463)

⁵¹⁴ *T.P. and K.M. v UK*, 28945/95, Judgment 10.05.2001

illustrate the CJEU's approach to this issue in relation to MR is to consider the somewhat analogous Brussels II Regulation.⁵¹⁵

Brussels II is similar to the EAWFD. It aims to deal efficiently with questions about the custody of children and to speedily execute court decisions. In order to do this it relies on the principle of MR whereby the decision on custody is decided by the courts of one MS and automatically enforced and respected by other MSs. As with the EAWFD there is a lack of common standards by which the decisions are reached. Additionally HRs do not appear as an express ground for refusing to execute the decision.

Zarraga v Pelz,⁵¹⁶ concerns a preliminary question from Germany asking the CJEU whether it was obliged to execute a decision of the Spanish courts when the manner in which it has been reached is a serious infringement of fundamental rights. Both Advocate-General Bot and the Court agreed that the German courts were to execute such a decision.

Bot makes it clear that Brussels II takes MR to another level. Unlike the EAWFD which lists, albeit an exhaustive list, of grounds when surrender must or could be refused, Brussels II does not provide any such grounds. There is no scope for a dual review. However in a similar vain to the EAWFD the logic of this conclusion is that the relevant rights can "be safeguarded by the courts of the Member State of origin."⁵¹⁷ The case concerned whether the child had been heard in accordance with Article 42 of Brussels II. As the CJEU reminds us, Brussels II has built-in procedural guarantees and so the premise is that the MS courts respect the obligations imposed on them by Brussels II and the CFR. This in turn means that Article 42 is interpreted in light of Article 24 of the CFR. On this basis the Court was happy to conclude that whether the court of the

⁵¹⁵ EU, Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II)

⁵¹⁶ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECR I-14247

⁵¹⁷ *ibid* Zarraga, View Of Advocate-General Bot, §128-30

MS of origin infringed Article 42 of the Regulation fell solely within the jurisdiction of that court, “the court with jurisdiction in the Member State of enforcement cannot oppose the recognition and enforcement of that judgment, having regard to the certificate issued by the court concerned of the Member State of origin.”⁵¹⁸

The enforcing MS is prevented from safeguarding the rights and preventing further violations, and the CJEU has exclusive jurisdiction to assess compliance with EU law. In the present case it relies on MR, trusting in the ability of national courts to protect the individual. Where this appears to leave the individual is that they have to return to a MS which may have already once violated their rights and trust (or rather hope) that they will get it right second time.

This said the CJEU’s approach in child abduction cases can be distinguished from the EAW in a number of ways. Brussels II takes MR to another level, the CJEU has made it clear that the E-MS cannot review the MS of origin for compliance with HRs. The EAWFD is not applied in such an automated manner, there is scope within the EAWFD to review the request. The rationale behind Brussels II is based on the purpose, namely to protect the best interests of the child by discouraging child abduction and avoiding lengthy delays. Whilst the EAWFD also seeks to speed up the surrender process, this is not critical to the purpose of the EAWFD which is to promote cooperation between MSs in criminal matters so that justice can be served. However *Zarraga* illustrates the balancing of interests that is involved between the best interests of the child to be heard and their best interest to avoid lengthy proceedings and the trauma of been ejected from an environment they have settled into during that period. The delicate balancing that is required in abduction cases boosts the argument that *Zarraga* and related jurisprudence is restricted to child abduction cases and does not have a broader application. In EAWFD cases the best interests of the child that are usually being balanced relate solely

⁵¹⁸ *ibid* §74, see also §§59-61

to the separation from their parent. Thus the balancing act is between the interests of the child and the fulfillment of international obligations.

The *N.S.* case, in the context of asylum, clearly places in certain circumstances an obligation on MSs to assess the HRs in the MS to which they are sending an individual. In the same case it also states that a presumption emanating from mutual trust cannot be absolute, but must be capable of rebuttal. This view is consistent with the ECtHR jurisprudence.

The ECtHR approach to this procedure is interesting. The general position is that the national courts are best placed to assess the delicate balance, adding that it was not their role to interpret the application of other international treaties. The ECtHR's assessment is not abstract but takes into account the legitimate purpose for interfering with a qualified right. On this basis, MSs have been given a wide margin of appreciation when implementing their obligations under the Hague Convention and the related Brussels II.⁵¹⁹ Despite the wide margin of appreciation implementation of the measures is not devoid of procedural guarantees.

The case of *Neulinger and Shrunck*,⁵²⁰ was critical of the automatic and mechanical application of the Hague Convention. In this case the mother had wrongfully taken the child from Israel to Switzerland. A key influencing factor was the father's behaviour in joining a religious cult. In addition, the child had grown up in Switzerland from the age of 2 months (in total 5 years at the date of judgment) and uprooting him would have serious consequences.⁵²¹ The ECtHR reaffirms that the consensus of international law is

⁵¹⁹ *Maumousseau and Washington v France*, 14600/05, Decision 6.12.2005

⁵²⁰ (n346)

⁵²¹ What is interesting to note and perhaps an indication that the outcome may be restricted to its specific facts is the delay in returning the child was caused by the ECtHR process itself. Whilst Switzerland had decided on the basis of its obligations under the Hague Convention to return the child, it was prevented from doing so by a Rule 39 interim measure granted by the ECtHR. The purpose of the Hague Convention was to condone child abduction and to ensure the child is returned promptly on the basis that this is in their best interests. It is not clear what message the ECtHR is sending in its own assessment of

that the child's "best interests must be paramount".⁵²² It states that "a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable". What was in the best interests of a child was reliant on a number of circumstances and the domestic authorities were best placed to make such assessment.⁵²³ An individual assessment was required in each case.

Finally, the interrelationship between the EAWFD and the Citizens' Directive should be noted. Where a child is concerned Article 28(3)(b) of the Citizens' Directive states that there must be "imperative grounds" for expelling them, unless it is in the best interests of the child to do so. Where a custodial parent is being surrendered in accordance with an EAW, consideration has to be given to the simultaneous expulsion or separation of any child. Under the Citizens Directive this can only occur if it is in the best interests of the child.⁵²⁴ The EAWFD makes no mention of the impact on family members or children, although it is stated that it is to be read in compliance with the EU *acquis communautaire* and so it follows that the impact on any children must be taken into account.

7.5.2 UK

The diversion into child abduction cases serves to set out the principles which have developed within their context. In the UK, the positioning of a child's interests is made clear by Lady Hale in *ZH (Tanzania)*, when "making the proportionality assessment under article 8, the best interests of the child must be a primary consideration."⁵²⁵ These are further reinforced by Lord Kerr who states that 'a primacy of importance must be accorded' to the best interest of a child effected by the decision. However, he went on to

the best interests of the child or in finding that the passage of time caused solely by Court proceedings was determinative.

⁵²² *Neulinger and Shrunck* (n346) §§49-56 and §135

⁵²³ *ibid* §138

⁵²⁴ Even where it is appropriate for the parent to serve a sentence of imprisonment, serving it in the host/E-MS where the children are residing will assist in maintaining contact, by facilitating visitation.

⁵²⁵ *ZH (Tanzania)* [2011] UKSC 4, §33

say that this is not a “factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors.”⁵²⁶

This case concerned immigration, however as asserted above, the ECtHR has not drawn a distinction between expulsion and extradition in Article 8 cases. In addition as set out by the court in *ZH (Tanzania)* the obligation to make the best interests of a child a primary factor are also set out in domestic law.⁵²⁷

The Supreme Court appeals of *HH and PH v Italy and FK v Poland* concerned requests for surrender under and EAW, in the joined cases of *HH* and *PH*, to Italy, and in *FK*, to Poland. The issue in all three was whether their surrender would violate the Article 8 ECHR rights of Appellants’ children. As Lady Hale summarised “No-one seriously disputes that the impact upon the younger children of the removal of their primary carers and attachment figures will be devastating. The issue is the relevance of their interests in the extradition proceedings.”⁵²⁸

The case of *FK* concerned a Polish mother of 5 (aged 21, 17, 13, 8 and 3). She and her husband had lived in the UK since 2002 where the youngest two children were born. Her husband is physically impaired and found to display signs of psychological disturbance, meaning that he would not be able to take care of the children. She was wanted for dishonesty offences which the court described as not trivial but of no great gravity either.⁵²⁹ Taking into account that there is no prosecutorial discretion in Poland and thus no proportionality test would have been conducted before issuing the EAW,

⁵²⁶ *ibid* §46

⁵²⁷ Section 11 Children Act 2004

⁵²⁸ *HH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); FK (FC) (Appellant) v Polish Judicial Authority (Respondent)*, [2012] UKSC 25, §1

⁵²⁹ *ibid* §44

together with the considerable delays at all stages of the proceedings;⁵³⁰ the Supreme Court unanimously held that the public interest in extraditing FK did not justify the inevitable harm that it would cause to the lives of her children.⁵³¹

The case of *HH and PH* concerned what all judges described as the most difficult case. HH and PH are the mother and father of 3 children born in 2000, 2003 and 2009. The parents were arrested pursuant to an EAW from Italy to serve sentences of imprisonment. PH is the primary carer whilst the mother HH is also resisting surrender on the basis of her mental health. The accepted outcome of their surrender is that the children will go into care with no guarantee of staying together which will have a profound effect on their physical and emotional health. The lower courts⁵³² did not accept that *Norris* was modified by *ZH (Tanzania)*, both courts holding that to surrender both parents was not disproportionate to their rights or the rights of their children.

The certified question for the Supreme Court was, “Where in proceedings under the EA the Article 8 rights of the children of the defendant are arguably engaged, how should their interests be safeguarded and to what extent, if at all, is it necessary to modify the Supreme Court’s approach in *Norris v Government of USA (No 2)* in light of *ZH (Tanzania)*?”

The two aspects of Article 8 argued by the appellants are that the evolution of the test is faulty, that it was never meant to be set at such a high threshold and that the best interests of a child should be a primary consideration. It was argued that some courts misinterpreted *Norris*, Lady Hale states that by focusing on select words in *Norris*, such as “some quite exceptionally compelling feature”⁵³³ the focus has shifted from the

⁵³⁰ It is worth noting that whilst FK could not rely on the delay as one of the bars to surrender because she had contributed to some of the delay, it was still a relevant factor in the Article 8 assessment.

⁵³¹ *HH, PH, FK* (n528) §48

⁵³² (1) *The Queen (on the application of) HH v City of Westminster Magistrates Court*, (2) *HH and PH v Deputy Prosecutor of the Italian Republic, Genoa* (3) *X, Y and Z* [2011] EWHC 1145 (Admin)

⁵³³ *ibid* §56

individual to a search for “out of the run of the mill” external factors. “Some particularly grave consequences are not out of the run of the mill at all. Once again, the test is always whether the gravity of the interference with family life is justified by the gravity of the public interest pursued”.⁵³⁴ The exceptionality referred to in *Norris* is a “description of the likely results of the extradition process” and not “as a forensic shorthand for the test.”⁵³⁵

Norris considered the application of Article 8 in the context of extradition and whilst it concerned family rights of two healthy adults, useful principles can be elicited. These were summarized by Lady Hale where she states quite clearly that whilst there may be a closer analogy between extradition and domestic criminal proceedings rather than with deportation and extradition an examination of the interference with family life still needs to be carried out by the court. To this end there is ‘no test of exceptionality in either context’. As she sees it, the test is always whether the interference with the family life of the extraditee and other family members outweighs the public interest in extradition. The constant public interest in extradition is that those accused should be brought to trial, convicted persons should serve their sentences, the UK should honor her treaty obligations to other states and that it should not create a safe haven. This public interest will always be weighty,

That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.

The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

⁵³⁴ *ibid* §32

⁵³⁵ *ibid* §124

Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless consequences of the interference with family life will be exceptionally severe.⁵³⁶

Commenting on *Wellington*, the court in *Norris* reiterated that the “case underlines the weight that the desirability of extradition carries as an essential element in combating public disorder and crime.”⁵³⁷ It also noted it was a controversial decision which found that even though the treatment the individual would receive in the USA would be considered inhuman treatment in the domestic context (of the UK), his extradition was still desirable given that the alternative to facing Article 3 prohibited treatment would be him escaping justice altogether. It highlighted “the weight that the desirability of extradition carries as an essential element in combating public disorder and crime.”

ZH (Tanzania) concerned the impact of a mothers deportation on her two children with the Supreme Court stating that a child’s interests are a primary consideration (not the primary or paramount consideration), although they could be outweighed by the cumulative effects of other considerations.⁵³⁸

Extradition and the fulfillment of international obligations is a legitimate aim. However as pointed out by Lady Hale implementation of the EAWFD is subject to the need to respect human rights obligations and so the UK is not absolved of “the duty to weigh the competing interests as required by article 8.”⁵³⁹

Built into the EAWFD is the need to respect HRs and as such the obligation to fulfill an EAW does not automatically or always outweigh HRs. A balance needs to take place.

Lady Hale suggests that judges take an orderly approach to their assessment of Article 8 in line with the ECtHR jurisprudence:

⁵³⁶ *Norris* (n452) §8

⁵³⁷ *Wellington* (n360) §47

⁵³⁸ *ZH* (n525)§11-15

⁵³⁹ *HH, PH, FK* (n528) §45

First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate aims within those listed in article 8.2. Third, it asks whether the interference is “necessary in a democratic society” in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale.⁵⁴⁰

It is clear that the balancing act according to Strasbourg standards is the same whether expulsion, extradition or domestic. This was stated in *Norris*, “there are [no] grounds for treating extradition cases as falling into a special category which diminishes the need to examine carefully the way the process will interfere with the individual’s right to respect for his family life”.⁵⁴¹ Lady Hale also usefully sets out the procedure to be followed in extradition proceedings in order to ascertain whether in the interests of the child the extradition should be refused. This procedure includes taking into account alternatives to prosecution abroad or imprisonment in the I-MS.⁵⁴²

Exactly because the consequences of the extradition decision are beyond the control and check of the E-MS there should be a heightened scrutiny of the potential impact on HRs. Fulfilling extradition treaties is not of more public interest than controlling immigration.

Lord Judge comments that the UK judges should not impose their opinions on others.⁵⁴³ This can be regarded as selective imposition. There is no problem enforcing the UK’s opinion that the death penalty is wrong when extraditing individuals for capital offences to the USA. So what is different to imposing the UK views when children in our control are involved? True a proportionality test needs to be conducted and a balancing act needs to be played out; however is the fulfilment of international obligations (almost)

⁵⁴⁰ *ibid* §30

⁵⁴¹ *ibid* §89

⁵⁴² *ibid* §§82-6

⁵⁴³ *ibid* §§132

always going to trump the rights of the child? The current case of *PH* is one example where you have minor participation in a serious cross-border drug crime and in one where there are alternative sentences. You also have 4 children of which at least one is at an age when separation from both parents would have a devastating effect. If States can negotiate and obtain guarantees on behalf of alleged/convicted murderers then why do they feel unable to obtain guarantees or negotiate alternative sentences in order to minimise devastating effects on young children? As stated, in Italy it is possible for *PH* to serve his sentence at home caring for his children. Thus in negotiations, the UK would not be imposing opinions but simply obtaining assurances that the interests of the children would be protected. It appears that the reason why greater weight is given to extradition is because whereas expulsion is a unilateral act for which the state does not require to rely on any other state; extradition is a co-operative endeavour and for it to work it requires all those concerned to comply. In addition to reciprocity, within the EAW procedure there is also mutual trust that the I-MS has within its system safeguards which will take into account the interests of the children; seeking assurances concerns political more than legal relationships.

Additionally whilst safe havens are undesirable, why do states not want to become a haven for those seeking HRs protection?

Lady Hale dismissed the appeal of *HH* but allowed the appeals of *PH* and *FK*. However the majority dismissed the appeals of both *HH* and *PH*. Lord Judge held that given the nature of the crimes committed by *PH*, the public interest in extradition outweighs the interference with the rights of his children.⁵⁴⁴ This view was shared by Lord Hope;⁵⁴⁵ Lord Brown;⁵⁴⁶ Lord Mance;⁵⁴⁷ Lord Kerr;⁵⁴⁸ and Lord Wilson.⁵⁴⁹ Lady Hale found that

⁵⁴⁴ *ibid* §§135-138

⁵⁴⁵ *ibid* §94

⁵⁴⁶ *ibid* §96

⁵⁴⁷ *ibid* §103

the effect on the children, in particular the youngest, outweighed the desirability of extradition of the father in addition to the mother.⁵⁵⁰

Had PH been sentenced in the UK he would (according to Lord Judge) receive 10 years. The difference between sentences in the UK (domestic) and in Italy is that if in the UK family visits could be more easily and frequently facilitated. The gravity of the offence is not disputed; however part of the consideration needs to be alternatives to surrendering an individual.

In the South African case of *M v The State*, “what has to be considered is the triad consisting of the crime, the offender and the interests of society”.⁵⁵¹ Expanding on the classic test at §33 Sachs J talks about taking into account alternatives within the legitimate range. So again why does the UK refuse to negotiate assurances as to the sentence? The principle of MR suggests that sentencing is the concern of the I-MSs and that if a state were to start interfering with the sentencing of another state, they will do the same to theirs. However, where does this reciprocity argument leave the child? Lord Wilson⁵⁵² states that in the UK they “do not start, as a “given”, with the “legitimate range of choices” and then fit the interests of the children into it; under article 8 their interests may, through the proportionality exercise, help to identify the legitimate range.”

Pending the decision of the Supreme Court in the *HH, PH and FK* case, it had been argued before lower courts that consideration of cases raising the primacy of the child’s best interests as well as the threshold for Article 8 interferences should be postponed until the judgment was delivered. The lower courts did not entertain these requests and

⁵⁴⁸ *ibid* §149

⁵⁴⁹ *ibid* §§170-72

⁵⁵⁰ *ibid* §79

⁵⁵¹ [2007] ZACC 18 the Constitutional Court of South Africa Sachs J cites *S v Zinn* 1969 (2) SA 537 (A) at 540G-H

⁵⁵² *ibid* §172

instead opted to apply a lower threshold when assessing the proportionality of surrender. Despite this, appeals against surrender on Article 8 were not successful. This is an interesting fact which may indicate that irrespective of how the legal test is framed, the threshold applied by the UK courts in practice is particularly high and that even where taking the rights of the child as a paramount importance, it will not in the majority of cases act as a bulwark to extradition.⁵⁵³

Another case from the UK, *EB v UK*⁵⁵⁴ is pending before the ECtHR on a similar point. EB is a single mother of 4 children arrested in pursuit of an EAW from Poland to stand trial for counts of insult, assault and threatening behaviour. The question posed to the parties by the ECtHR is, “[w]ould the applicant’s extradition to Poland and consequent separation from her children, including an infant whom she is breastfeeding, be in violation of Article 8?”

7.6 Private Life

As stated above those remote relationships which do not fall within the family life rubric are likely to be considered under the private life sphere. Private life arguments are relevant to those individuals who have established a life in the UK by staying for a long period, working or becoming part of the community. Such an interference with a person’s private life will occur in the same way as set out above in reference to family life.

In addition to this kind of interference, there are other interferences which could fall under Article 8. These include improper searches of home (and workplaces⁵⁵⁵) and

⁵⁵³ Another Supreme Court case concerned BH and KAS, parents of 6 children wanted in the US. The issue was also the weight to be given to the rights and interests of the children when considering Article 8 issues in extradition cases. The appeal dismissed and both extradited. KAS family life had ceased so no longer relevant whilst although BH was the sole carer of the children, the offences accused of were serious and committed over a substantial period of time. (1) *BH and (2) KAS or H v The Lord Advocate and another (Scotland)* UKSC 2011/0217 and UKSC 2011/0210.

⁵⁵⁴ 63019/10. In the UK the case is *R (B) v Regional Court of Elbag* [2010] EWHC 2958 (Admin)

⁵⁵⁵ *Niemietz v Germany*, 13710/88, Judgment 16.12.1992

disproportionate interception of communication and surveillance.⁵⁵⁶ In relation to the EAW, the question arises as to whether evidence of such practices which are incompatible with Article 8 should act as a bar to surrender. This will be considered in the context of criminal proceedings, together with Article 6 concerns which may mean that inappropriately obtained evidence will be used/admissible at trial.

Given the wide margin of appreciation granted to MSs by the ECtHR, it is doubtful whether inappropriately obtained evidence will be sufficient to bar surrender. The same old reasoning of the availability of dual review will be applied. In other words setting aside any review the E-MS may conduct, the ECtHR will also take into account the assessment by the I-MS. The threshold will be high and unless there is a ‘flagrant denial’ of the guarantees or evidence of systematic violations in for example the obtaining and use of evidence, it is unlikely that the ECtHR will find a violation.

7.6.1 Chemical Castration

Article 8 also respects the physical and moral integrity of an individual. An interference with this is compulsory medical treatment.⁵⁵⁷ Related to this is the growing number of MSs employing chemical castration as part of sentence upon criminal conviction. As acceptance grows across the EU, what would it take to equate this to a violation of Article 8 (if not more appropriately of Article 3)?

In 2012, the UK started running a pilot programme of voluntary chemical castration. In reply to the Guardian newspaper,⁵⁵⁸ the Ministry of Justice stated that the basis for their decision to support the programme were the guidelines of the World Federation of

⁵⁵⁶ *Klass and others v Germany*, 5029/71, Judgment 6.09.1978; *Malone v UK*, 8691/79, Judgment 2.08.1984; *Copland v UK*, 62617/00, Judgment 3.04.2007

⁵⁵⁷ *Glass v UK*, 61827/00, Judgment 9.03.2004

⁵⁵⁸ <http://www.guardian.co.uk/politics/reality-check-with-polly-curtis/2012/mar/13/prisons-and-probation-criminal-justice> accessed 11.05.2012.

Societies of Biological Psychiatry.⁵⁵⁹ The UK courts have held that provided the individual consents to chemical castration it will not violate his rights under Article 3. In *Janiga*,⁵⁶⁰ surrender was being resisted on the basis that no consent was required before imposing chemical castration in the Czech Republic. Despite the presentation of CPT reports expressing concern about the imposition of such treatment, the Divisional Court was happy that in the particular circumstances consent was required; the choice being between treatment or prolonged imprisonment. The CPT report cited in *Janinga* provides further guidance. It states,

the CPT considers that anti-androgen treatment should always be based on a thorough individual psychiatric and medical assessment and that such medication should be given on a purely voluntary basis. As should be the case before starting any medical treatment, the patient should be fully informed of all the potential effects and side effects and should be able to withdraw his consent and have his treatment discontinued at any time. Further, the administration of anti-androgens should be combined with psychotherapy and other forms of counselling in order to further reduce the risk of reoffending. Also, anti-androgen treatment should not be a general condition for the release of sex-offenders, but administered to selected individuals based on an individual assessment.⁵⁶¹

As with other violations of HRs, the individual will need to provide evidence of a real risk to themselves and not only the general situation in order to successfully resist surrender. It also raises the question of whether MR is sufficient to deal with other peculiar sanctions.

⁵⁵⁹ Florence Thibaut, Flora De La Barra, Harvey Gordon, Paul Cosyns, John M. W. Bradford and The WFSBP Task Force on Sexual Disorders, *The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias*, *The World Journal of Biological Psychiatry*, (2010) 11: 604–655

⁵⁶⁰ *Janiga v Ustinad Labem Regional Court Czech Republic* [2011] EWHC 553 (Admin)

⁵⁶¹ CPT, *Report to the Czech Government on the visit to the Czech Republic carried out by the CPT from 25 March to 2 April 2008*, CPT/Inf (2009) 8 §25

7.7 The EAW and Family Life

7.7.1 Passing the Buck

The current practice flowing from mutual trust means that instead of preventing HRs violations at the first opportunity the responsibility for consideration of HRs arguments is being passed to the I-MS and if that fails to the ECtHR.

In terms of Article 8 it is presumed that the I-MS would have conducted the balancing act before making the request. As we know this is not always the case, for example there is no prosecution discretion in Poland. Even where the MS conducted a proportionality test, the circumstances of an individual and his family change, when there has been a delay how does the I-MS know what the individual's circumstances are in the E-MS?

As clearly stated by both the ECtHR and CJEU in the *M.S.S.* and *N.S.* cases, MSs cannot simply make a presumption that HRs will be respected upon surrender. They need to give genuine consideration to evidence to the contrary. As reiterated by the ECtHR on countless times the rights need to be real and practical and not theoretical and illusory. In terms of Article 8 it can be violated as soon as the person leaves the shores of the E-MS and not only when they find themselves in the I-MS.

7.7.2 Evidential Burden

In terms of an individual, what must they show to satisfy the courts that they should not surrender the individual? As is evidenced by the jurisprudence, the UK sets an extremely high threshold with any flexibility being utilised to facilitate surrender. The ECtHR has fully dealt with the issue in relation to deportation but not extradition/EAW.

One of the disputed areas between the UK authorities and defence lawyers is the relevance or weight of the "best interests of the child". The jurisprudence is clear that all

factors need to be taken into account and where viable alternatives are available but are simply disregarded without genuine consideration and compelling reasons, the MS will be in violation of Article 8.

Article 8 involves a balancing act. The same scales are used in all cases, what differs are the issues which are to be balanced. In EAW cases a constant will be the importance of fulfilling Treaty obligations, as well as the public interest for the individual to stand trial or serve a sentence. Other aspects of ‘public interest’ will vary depending on the seriousness of the crime and any delay since the alleged commission of the crime. On the other end of the scales, authorities are required to consider the individual circumstances and whether any less intrusive alternatives exist to surrender. As noted above some alternatives are provided by the EAWFD itself in addition to other MR measures, during pre-trial stages the ESO and post-trial the Transfer of Prisoners FD. Rehabilitation and reintegration have been recognized not only as significant elements of the criminal justice system, but also as important considerations during sentencing. Central to reintegration of an individual into society is their family and established private life. Thus this provides a further reason for taking into account family life when deciding whether to surrender an individual. Amongst the factors to be taken into account, the interest of any children will be a primary consideration. The HRs of the family life need to also marry up to the Treaty rights of EU Citizens. The rights acquired and the thresholds applied will depend on which step of the ladder the individual and their family are found, however states should ensure that innocent family members and children are not also punished for wrongdoings.

The UK case law relating to EAWs and Article 8 is illustrative of how this balancing act will play out in practice. When consider Article 8, UK courts will distinguish between domestic and foreign cases, this distinction will not always be useful in EAW cases which will for the most part be a hybrid of the two. Courts are clear that instances

where Article 8 rights will be found to outweigh the public interest are rare. A set of exceptional circumstances will need to be shown in order to tip the balance against surrender. In UK courts the word ‘exceptional’ is applied to circumstances where surrender would be refused. Following a number of confused cases, it is now clear that ‘exceptional circumstances’ is not a test but relates to the factual circumstances (i.e.) not the normal consequences of arrest, detention or surrender. The threshold to be met is high and a minor interference will not be sufficient, in such cases the court will hold that the surrender is both necessary and proportionate. The principle of MR further raises the threshold to be met, however both the ECtHR and CJEU have made it clear (in the asylum context) that this kind of presumption must be rebuttable not only in theory but also in practice.

Chapter Eight: A Fair Trial

The right to a fair hearing is guaranteed by Article 6 ECHR and Articles 47 and 48 CFR. These rights can be broken down and applied at different points of criminal proceedings. They raise obligations for the I-MS and the E-MS in terms of its own proceedings as well as those of the I-MS.

The right to a fair trial under Article 6 encompasses much more than the rights of the defendant, however, a major element of Article 6 is the provision of a real and effective opportunity to defend oneself to ensure the fairness of the proceedings as a whole. The focus of the discussion on the right to a fair trial in the context of the EAW shall also be on defence rights.

A restriction of Article 6 is that it applies to civil or criminal proceedings as defined by the ECtHR with Articles 6(2) and (3) guarantees applying only to a ‘criminal charge’.

The ECtHR treads carefully with Article 6 cases to ensure that it is not considered a court of fourth instance. Its role is not to double guess decisions of national courts, and it will not deal with errors of law or fact. Its role is of a subsidiary nature which means that ideally HRs should ultimately be protected and redressed at the national levels. Its review of proceedings will only go as far as examining whether they have infringed the Convention rights.⁵⁶² Although the Court is concerned with procedural irregularities, it will also take into account the effects of these on the findings on the merits.⁵⁶³

⁵⁶² *Garcia Ruiz v Spain*, 30544/96, Judgment 21.01.1999

⁵⁶³ *Khamidov v Russia*, 72118/01, Judgment 15.11.2007

There are more complaints under Article 6 than under any other provision, with the vast majority concerning criminal proceedings.⁵⁶⁴ This means that there are a large number of cases from which to elicit the jurisprudence of the ECtHR. The focus will be on the lead cases which summarize and develop this jurisprudence and those against EU MSs.

8.1 Applicability to Extradition and the EAW

It is essential to distinguish the applicability of Article 6 to the E-MS and to the I-MS. Article 6 applies to criminal proceedings before the I-MS. Applicability to the E-MS is not clear and depends on the interpretation of a ‘determination of civil rights’ and a ‘determination of a criminal charge’. This discussion is of relevance to the proceedings of the E-MS, in that they assist in assessing why Article 6 guarantees are applicable to the EAW proceedings.

In the E-MS, under the ECHR, the EAW procedure is likened to extradition and therefore not considered a determination of a ‘civil right’ or a ‘criminal charge’ and as such Article 6 ECHR is not applicable.⁵⁶⁵ Extradition proceedings in the E-MS are not subject to Article 6 guarantees under the ECHR. However, it is clear that the right to a fair trial under the Charter extends beyond the restricted scope of the ECHR and the guarantees are capable of encompassing and applying to EAW proceedings. This highlights the inadequacy of solely relying on the ECHR at EU level.

Besides this difference in scope, the current approach of the ECtHR to extradition under Article 6 is not sound.⁵⁶⁶ When the ECHR was adopted, cross-border movement and transnational crimes were not the common phenomenon that they are nowadays. The

⁵⁶⁴ According to ECtHR statistics, between 1959-2010 there were 8019 findings of a violation of Article 6, the second highest number of violations found were 2414 of Article 1 of Protocol 1. In 2010 the highest number of violations were of Article 6 (804 violations), the second highest were 315 violations of Article 5, followed by 306 violations of Article 3. ECtHR, *Annual Report 2010*, Registry of the Court, (2011).

⁵⁶⁵ *Mamatkulov and Abdurasulovic v. Turkey*, Applications nos. 46827/99 and 46951/99, [GC] Judgment 4.02.2005; *Olaechea Cahuas v Spain*, 24668/03, Judgment 10.08.2006

⁵⁶⁶ A similar tracking of authorities on the non-applicability of Article 6 to extradition is carried out by Langford. See Peter Langford, *Extradition and fundamental rights: the perspective of the European Court of Human Rights*, I.J.H.R., (2009) 13:4, 512-29

scope of the ECHR has yet to catch up with modern living where the activities of individuals are rarely confined by the jurisdictional borders of one country. True to the spirit of the CFR, the widening of the scope in the CFR illustrates the EU's recognition of the altered environment, requirements for HRs protection and of the impact extradition has on the rights and freedoms of individuals. A fresh approach needs to be taken as to the applicability of fair trial guarantees to the proceedings of the E-MS. Scrutinizing the EU approach to HRs through the CFR and other documents will explain how these guarantees are applicable to the E-MS proceedings.

Beyond the restrictive view of proceedings in the E-MS, the ECtHR has recognized situations where a risk of facing a violation of a right may oblige a state to not fulfill an extradition request. The jurisprudence before the adoption of the principle of MR in the criminal sphere created obligations on the E-MS to give due consideration to whether there was a real risk that the individual would face or has faced a 'flagrant denial' of a fair trial in the I-MS. Failure to do so ordinarily means that they would be held complicit in a resulting violation.⁵⁶⁷ The principle of MR appears to have brushed aside this obligation, trumping all previous jurisprudence. The line of argument from MSs is that a high level of confidence now exists between MSs to such a level that they should be blindly trusted and that no inquiry is necessary. Mutual trust exists that the systems of all MSs offer the same level of protection of HRs and respect for the rule of law.

The current line of arguments from the ECtHR is that MSs are entitled to apply this mutual trust since all EU MSs are also Contracting Parties to the ECHR and thus the individual's right to individual petition is preserved so that if things do ultimately go wrong they can still petition the ECtHR. Thus the ECtHR has made itself a reactionary court as opposed to a court actively promoting the prevention of HRs violations at the national levels, at the earliest opportunity. Reflecting on this jurisprudence together with

⁵⁶⁷ *Soering* (n177); *Drozd and Janousek v France and Spain*, 12747/87, Judgment 26.06.1992

the altered application by both MSs and the ECtHR will show how this new approach is not justified, in the sense that it does not flow from the earlier jurisprudence. The missing steps need to be built-in before the principle of MR can be applied with such a high level of confidence.⁵⁶⁸

The right to a fair trial, as provided for under Article 47 CFR, is wider in scope and applicability than Article 6 ECHR. According to the explanatory text, the right to a fair trial in Community law is “not confined to disputes relating to civil rights and obligations”.⁵⁶⁹ Guarantees under Article 47 apply in the same way as those provided for by the ECHR, with the key differentiation being their scope. This difference is based in part on the fact that the EU is a community based on the rule of law as reflected in the case of *Les Verts*.⁵⁷⁰ The power to extend the scope of rights beyond the minimum standards established by the ECHR is also found in Article 52(3) which provides that Union law is not prevented from “providing more extensive protection”. This broader EU scope under the CFR and applicability of procedural guarantees to the EAW are also confirmed by the EU elsewhere including within the Stockholm Roadmap and its measures.

8.2 Applicability of Article 6 to the Executing Member State

8.2.1 Autonomous Meaning of ‘civil rights’

The ECtHR has given ‘determination of civil rights and obligations’ an autonomous meaning, in the sense that the domestic definition is not decisive. As Judge Loucaides points out in his dissenting opinion in *Maaouiia*,⁵⁷¹ the word ‘civil’ has not however been defined by the ECtHR. Taking a teleological approach he concludes that the

⁵⁶⁸ These steps will be dealt with in later chapters.

⁵⁶⁹ EU, Text of the explanations relating to the complete text of the Charter Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, CONVENT 49 11.10.2000

⁵⁷⁰ Case 294/83, *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 01339

⁵⁷¹ Joined by Judge Traja, *Maaouiia v France*, 39652/98, [GC], Judgment 5.10.2000, 18-23

drafters' intention was for 'civil' to mean anything that was not 'criminal' and not only the private law domain. He supports this view with examples where the ECtHR has itself held that non-private law issues fall within the meaning of 'civil'. On the basis of this line of interpretation, if extradition proceedings are not considered 'criminal' they are by default 'civil' and therefore the Article 6 guarantees applicable to 'civil' proceedings should also apply to them.

This is not however the jurisprudence of the ECtHR which has laid down a set of not particularly helpful criteria. The words 'determination of civil rights and obligations' require a private law obligation, although an administrative or public law right will not automatically exclude the issue from the meaning of 'civil'. In the same way a dispute between two individuals is more likely to be 'civil' although a dispute over a right with a public authority can also still be 'civil'. In order to ascertain whether a particular proceeding is 'civil' a starting point would be the extensive ECtHR jurisprudence and whilst a range of proceedings have been held to be 'civil', neither extradition nor EAW proceedings have been placed under this head.⁵⁷²

8.2.2 Autonomous Meaning of 'criminal charge'

The ECtHR has also given 'criminal charge' an autonomous meaning and extradition proceedings do not fit within this definition either.

What is 'criminal' is not definitively defined, but is rather dependant on the facts of individual cases. In *Engel*,⁵⁷³ the Court set out the 3 step test for determining whether proceedings concern a 'criminal charge'.

⁵⁷² See Peter van Dijk and others, *Theory and Practice of the European Convention on Human Rights*, (2006) 513-28

⁵⁷³ *Engel and Others v the Netherlands*, 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment 8.06.1976 §82

The classification in domestic law is a starting point and the ECtHR may also under the second criteria also consider the procedures and the similarity to criminal offences in other MSs although neither are decisive.⁵⁷⁴

The second criterion is considered more important than the first⁵⁷⁵. Certain factors can be elicited from the Court's jurisprudence which are to be taken into account when determining this second criterion. These include: whether it is exclusively addressed to a particular group, or if it is of a generally binding character;⁵⁷⁶ who instituted the proceedings, for example, was it a public body with statutory powers of enforcement;⁵⁷⁷ whether it has a punitive or deterrent purpose;⁵⁷⁸ whether the imposition of a penalty is dependent upon a finding of guilt;⁵⁷⁹ and although not decisive, how similar procedures are classified in other MSs.⁵⁸⁰

This is related to the third criterion and the Court will have regard to the nature and purpose of the penalty "liable to be imposed", in particular whether it acts as a deterrent and is punitive. It is important to note that what is relevant is the sentence available and not the actually penalty imposed.

In *Campbell and Fell*,⁵⁸¹ the Court applied the criteria as set out in *Engel* to determine that disciplinary proceedings in that case constituted a "criminal charge". The decision was based on the "especially grave" character of the offences charged and the nature and severity of the penalty that he risked incurring. The Court stated that where the

⁵⁷⁴ *Campbell and Fell v UK*, 7819/77, 7878/77, Judgment 28 June 1984.

⁵⁷⁵ *Jussila v. Finland*, 73053/01, [GC] Judgment 23.11.2006 §38

⁵⁷⁶ *Bendenoun v. France*, 12547/86, Judgment 24.02.1994 §47

⁵⁷⁷ *Benham v. UK*, 19380/92, Judgment 10.06.1996 §56

⁵⁷⁸ *Öztürk v. Germany*, 8544/79, Judgment 21.02.1984 §53

⁵⁷⁹ *Benham v UK*, 19380/92, Judgment 10.06.1996 §56

⁵⁸⁰ *Öztürk* (n578) §53

⁵⁸¹ *Campbell and Fell* (n574)

penalty liable to be imposed was the deprivation of liberty, it belongs to the criminal sphere.⁵⁸²

“Charge” has an autonomous meaning and is crucial in determining the point at which Article 6 is engaged. It has been described as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence” or some act which carries similar implications where the situation of the individual is “substantially affected”.⁵⁸³

In *Öztürk*, the Court held that the lack of seriousness of a charge/offence does not take away criminal categorization. It reiterated that the national classification of an offence is not decisive. It went on to hold that if states were able to exclude the operation of Articles 6 and 7 by classification, “the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.”⁵⁸⁴

The guarantees under Article 6 apply from the moment an individual is ‘charged’ within the ECHR meaning, which may be before the national authorities consider a person ‘charged’. Criminal proceedings are not necessary for Article 6 to be engaged.⁵⁸⁵ These guarantees include the guarantee for an independent and impartial tribunal,⁵⁸⁶ the right to participate effectively,⁵⁸⁷ a public hearing,⁵⁸⁸ and reasonable length of proceedings.⁵⁸⁹

⁵⁸² *Ibid*, §27

⁵⁸³ *Deweere v Belgium*, 6903/75, Judgment 27.02.1980 §46

⁵⁸⁴ *Öztürk* (n578) §49

⁵⁸⁵ *Deweere* (n583)

⁵⁸⁶ *Hauschildt v Denmark*, 10486/83, Judgment 24 May 1989

⁵⁸⁷ *T. v UK*, 24724/94, [GC] Judgment 16.12.1999; *V v UK*, 24888/94, [GC] Judgment 16.12.1999

⁵⁸⁸ Unless the right is waived. *Hakansson and Sturesson v Sweden*, 11855/85, Judgment 21 February 1990

⁵⁸⁹ *Eckle v Germany*, 8130/78, Judgment 15 July 1982

Although the pre-trial stage is most relevant to the EAW, it should be noted that in *Hornsby*,⁵⁹⁰ the Court held that the execution of judgments is an integral part of the ‘trial’ and therefore Article 6 is applicable at this stage.

The cases of *Campbell* and the others cited above are some examples of the criteria being applied by the ECtHR, giving us an idea of the ECtHR’s thoughts of what will be considered a ‘criminal charge’. However as will be illustrated, the principles have never been directly applied to extradition or the EAW with any adequate level of consideration.

8.2.3 Exclusion of Extradition from the Scope of Article 6

As already stated, for the purposes of the ECHR, extradition procedures themselves are not considered to fall within the criminal procedures in the E-MS. The ECtHR has deployed two different lines of authorities in making this statement. The first relates to the opinion that extradition proceedings are not regarded as a determination of a criminal charge, they are not: an investigation of a criminal offence; or an investigation of facts that are likely to corroborate a reasonable suspicion that an offence was committed. Recently, by way of a simple proclamation it has been added that they are also not the determination of civil rights or obligations.

The second line of authorities relied upon stem from immigration cases and is based on the state’s right to determine the status and stay of aliens within its sovereign territory. Here the ECtHR simply refers to its case law on immigration and asylum to support its proposition that extradition proceedings do not fall within Article 6.

8.2.4 Determination of a criminal charge (or civil rights)

In *Salgado*,⁵⁹¹ the Court held that decisions on extradition requests are not criminal. The Court recalled that the right not to be extradited is not, as such, among the rights and

⁵⁹⁰ *Hornsby v Greece*, 18357/91, Judgment 19.03.1997

freedoms set forth in the ECHR.⁵⁹² It stated that the extradition process does not dispute the applicant's civil rights and obligations, or the determination of the merits of a criminal charge against him within the meaning of Article 6 ECHR.⁵⁹³

Mr Salgado's extradition to Ecuador had been ordered by Lebanon and he was to be returned via France. Upon arrival in France, the applicant informed the authorities that he had sought asylum in Spain (where he had moved to from Ecuador). France returned him to Spain under the Dublin II Convention. Having rejected his asylum application the *Audiencia Nacional* held that the order of extradition from Lebanon was an act of sovereignty and as a passive extradition on Spain's part, which Spain could not revise or interfere with the extradition in transit. Before the ECtHR, the applicant relying on Article 6 ECHR complained that Spanish courts did not consider the merits of the extradition proceedings or the circumstances in which Ecuador demanded the extradition from Lebanon (via a document whose translation into Arabic was distorted). Given that the fairness of an extradition procedure followed in a State Party to the ECHR does not fall under the jurisdiction of the ECtHR, it held that an extradition process in Lebanon could also not be considered by the Spanish Courts.⁵⁹⁴ What is lacking from this decision is any analysis whereby the principles are applied to extradition proceedings.

In *Salgado* the ECtHR makes reference to a list of cases which in turn refer to earlier judgments as authority for the statement. It is worth considering these cases in turn to illustrate the jurisprudential weakness of the current stance. The cases are considered in chronological order, starting with the earliest cited.

⁵⁹¹ *José Alejandro Peñafiel Salgado v. Spain*, 65964/01, Decision 16.04.2002

⁵⁹² *K and F v UK*, 12543/86, Decision 2.12.1986, 272

⁵⁹³ Quoting by example, *RAF v Spain*, 53652/00, Decision 21.11.2000, and *Farmakopoulos v. Belgium*, 11683/85, Decision 8 February 1990, P., R.H. and L.L., 15776/89, Decision 12.05.1989 and *Raidl v. Austria*, 25342/94, Decision 4.09.1995

⁵⁹⁴ As seen above, it was however the obligation of Spain to ensure that his rights guaranteed by Articles 2 and 3 of the Convention would be respected in Ecuador.

In *Whitehead*,⁵⁹⁵ the Commission only considered that extradition proceedings did not concern a ‘determination of a criminal charge’. It defined ‘determination’⁵⁹⁶ as referring to “a complete process of examination of the guilt or innocence of an individual charged with an offence, and not just the determination of whether or not an individual may or may not be extradited to another country”.⁵⁹⁷ This is taken word for word from its earlier decision in *H*⁵⁹⁸ and it is to this case that the line of jurisprudence can be traced. The Commission held that since the *Audiencia Nacional* specifically stated it could not examine the merits of the charges against Mr H in the US, but only whether the formal extradition requirements, the extradition proceedings did not involve the determination of a criminal charge against the applicant within the meaning of Article 6(1). The Commission in *Farmakopoulos*,⁵⁹⁹ also only affirmed that extradition proceedings do not concern the determination of a criminal charge. In *Raidl*,⁶⁰⁰ the complaint under Article 6 was that important decisions were not served on counsel until late, again a simple sentence states that Article 6 is not applicable because it does not concern the determination of a criminal charge.

The *RAF*⁶⁰¹ decision sees for the first time the inclusion within the usual statement that extradition is not a determination of a criminal charge that it is also not a dispute “over an applicant’s civil rights and obligations”. In doing so it refers to the previous jurisprudence, none of which dealt with the question of civil rights and obligations in the context of extradition proceedings.

⁵⁹⁵ *Whitehead v Italy*, 13930/88, Decision 11.03.1989

⁵⁹⁶ The term ‘determination’ is ‘décider’ in French.

⁵⁹⁷ *Whitehead* (n595) 272

⁵⁹⁸ *H v Spain*, 10227/82, Decision 15.12.1983, 93

⁵⁹⁹ *Farmakopoulos* (n593) 52

⁶⁰⁰ *Raidl* (n593) 134

⁶⁰¹ *RAF* (n593)

In *Kirkwood v UK*,⁶⁰² the Commission states that the determination of guilt or innocence will be determined by separate proceedings in the I-MS and the extradition hearing does not form part of these proceedings, they do not involve the determination of a ‘criminal charge’.⁶⁰³ The main line of reasoning by the Commission in *Kirkwood* appears to be that extradition proceedings were similar to committal proceedings, mere preliminary proceedings in the criminal process and considered “wholly inappropriate” for them to attract “the full panoply” of procedural guarantees under Article 6. *X v Norway*⁶⁰⁴ is where the full definition is found of what is meant by “proceedings as a whole...that is after they have been concluded”. This particular phrase is also used to assess the general fairness of a trial. It recognizes that some breaches can be remedied during the course of proceedings without being fatal to the proceedings as a whole. However, the Commission in this case went on to state that “it cannot be excluded that a particular aspect of the proceedings which may be assessed in advance, can be of such importance as to be decisive to the assessment even at an earlier stage”. It is pertinent to add that the ECtHR has only recently confirmed not only the applicability, but also the importance of, procedural guarantees at the pre-trial stages.⁶⁰⁵ By analogy, if extradition proceedings are to be considered equivalent to such pre-trial stages, then it is of equal importance that the guarantees are applicable to extradition hearings.

Extradition proceedings are capable of being assessed in advance, that is before the conclusion of the entire criminal justice procedure. More importantly, aspects of the extradition proceedings which could be regarded as unfair cannot be rectified in any subsequent hearing in the I-MS. For these reasons it is important that procedural guarantees are respected during the EAW procedure in the E-MS. This point is

⁶⁰² 10479/83, Decision 12.03.1984, 158

⁶⁰³ *Ibid*, 191

⁶⁰⁴ 7945/77, Decision 4 July 1978, 228

⁶⁰⁵ *Salduz v Turkey*, 36391/02, [GC] Judgment 27.11.2008

considered in greater detail when examining the extension of the presumption of innocence to extradition proceedings.

8.2.5 Application to the EAW

The recent decisions dealing specifically with the EAW highlight the defective reasoning of the ECtHR. In its decision in *Angora*,⁶⁰⁶ the ECtHR asserts that the right not to be extradited does not exist and that extradition is not a determination of civil rights or a criminal charge. This statement is made solely by the reiteration of its words from the *Salgado* decision as set out above. Its justification for applying its previous jurisprudence on extradition to the EAW is made in three points. Firstly, EAW proceedings replace extradition proceedings in the EU, serving the same purpose, namely surrendering to the authorities of the I-MS a person who is suspected of having committed an offence, or who has been convicted by a final decision and requested to serve a sentence. In the ECtHR's logic, it therefore follows that the EAW and extradition are equivalent. Next, the implementation of the EAW is virtually automatic: the judiciary does not conduct a review of the EAW for compliance with its own internal laws, and refusal to surrender is based on an exhaustive list of grounds set out in the law. According to the ECtHR, it follows that the EAW procedure does not concern the determination of a 'criminal charge'.

As already shown the implementation and functioning of the EAW is not as simple as this, with many MSs introducing into their implementing laws additional grounds for refusal; including the need to review requests and their consequences for compatibility with their own national laws, Constitutions and international obligations. Further, whilst the EAW may replace extradition between EU MSs, the EU has gone to great lengths to highlight that it is a different creature which changes dramatically the cross-border

⁶⁰⁶ *Monedero Angora v Spain*, 41138/05, Decision, 7.10.2008

dynamics of criminal justice systems within the EU – something the ECtHR has so far chosen to ignore.

The cases of *Salgado* and *Angora* illustrate how the ECtHR has to date formulated its treatment of extradition and EAW proceedings under Article 6. Its conclusion that the procedural guarantees are not applicable to proceedings of the E-MS have to date only been based on unexplained proclamations or as it will now be shown, citation of authorities relating to asylum proceedings.

8.2.6 Aliens

The ECtHR's reliance on jurisprudence which stems from asylum proceedings is questionable. In *Mamatkulov*, the ECtHR states that Article 6 is not applicable to extradition proceedings (relying on a deportation case of *Maaouiia*⁶⁰⁷) "decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6§1 of the Convention."⁶⁰⁸ It is worth noting that whilst an analogy with deportation cases may be inappropriate, this case concerned individuals who could be regarded as neither resident nor nationals of the respondent countries,⁶⁰⁹ in this respects the ECtHR may have been correct in basing its statement on the fact that the individuals could be referred to as 'aliens'. It is interesting to note that whilst Mr Salgado was an asylum seeker in Spain, the ECtHR in that case did not rely on an analogy with deportation cases. Mr Ismailov was also an 'alien' which indicates that there may not be an exact science to the logic of the ECtHR. Nevertheless, Langford⁶¹⁰ makes some valid points in relation to the deportation analogy. The main line of criticism is that in making these statements the ECtHR simply reconfirms previous

⁶⁰⁷ *Maaouiia v France*, 39652/98, [GC] Judgment 5.10.2000

⁶⁰⁸ *Mamatkulov* (n565) §82

⁶⁰⁹ Mr Mamatkulov was in Turkey on a tourist visa and Mr Abdurasulovic had entered Turkey on a false passport.

⁶¹⁰ Langford (n566), 524

cases, which did not concern extradition proceedings, without giving any contextual consideration. This analogy between deportation and extradition is undermined by the fact that the relationship between states in extradition proceedings exist due to bilateral treaties, whereas deportation is based on an entirely unilateral act and “the state is the sole determinant of the decision to initiate”⁶¹¹ and as such could be characterized as an administrative procedure.

A point which follows on from this distinction is that in deportation cases the state is acting on its own initiative based on their sovereignty to control entry, residence and expulsion in their territory in accordance with its own laws and procedures which are subject to the checks of their own Constitutional rights and guarantees as assessed by its own authorities and judiciary. In the case of extradition, the state is exercising qualified sovereignty to enforce (by prior agreement) a decision of another MS made in accordance with their laws and procedures which the E-MS has no control over. In the case of an EAW request there is also a restraint placed on the internal checks and balances of the E-MS. This means it is crucial that during the EAW process in the E-MS procedural guarantees are respected so that the limited protection it can offer is maximised.

These points illustrate the defective jump from deportation to extradition. A link clearly distanced by the Council of Europe itself in Protocol 7 which is applicable only to deportation and explicitly excludes extradition. This was also a line of thinking adopted in the *Maaouia* case for concluding that Article 6 does not apply to deportation cases.⁶¹²

The characteristics of extradition and the acceptance of I-MS systems, means that procedural guarantees are an important check.

⁶¹¹ Langford (n566)

⁶¹² *Maaouia* (n607) §§36-9. See also the Concurring opinion of Judge Costa joined by Judges Hedigan and Panțiru and the Concurring opinion of Sir Nicolas Bratza who whilst agreeing with the conclusion that Article 6 is not applicable, disagree with the basis for reaching that conclusion.

8.2.7 Defective Reasoning

In terms of the applicability of Article 6 to the EAW, the position is not clear under ECHR jurisprudence. There is no evidence in the authorities that the argument extradition is not a determination of a criminal charge or a dispute concerning civil rights or obligations has been well thought out or authoritatively considered. As shown, one line of authorities are based on an analogy with deportation cases and the other is based on a series of proclamations.

The following unusual statement by the ECtHR introduces further doubt as to the soundness and consistency of the ECtHR's jurisprudence. In *Ismailov*, the ECtHR was considering whether statements made during a decision to extradite the applicant had an impact on his presumption of innocence. Despite first concluding that the "extradition proceedings against them did not concern the determination of a criminal charge, within the meaning of Article 6",⁶¹³ the ECtHR applied the reasoning in the earlier case of *Zollmann*,⁶¹⁴ to ascertain "whether there was any close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicants in Uzbekistan which might be regarded as sufficient to render the applicants "charged with a criminal offence" within the meaning of Article 6 § 2".⁶¹⁵ The Court concluded that,

the applicants' extradition was ordered for the purpose of their criminal prosecution. The extradition proceedings were therefore a direct consequence, and the concomitant, of the criminal investigation pending against the applicants in Uzbekistan. The Court therefore considers that there was a close link between the criminal proceedings in Uzbekistan and the extradition proceedings justifying the extension of the scope of the application of Article 6 § 2 to the latter. Moreover, the wording of the extradition decisions clearly shows that the prosecutor regarded the

⁶¹³ *ibid*, §162

⁶¹⁴ *Zollmann v UK*, 62902/00, judgment 27.11.2003

⁶¹⁵ *Ismailov and others v Russia*, 2947/06, Judgment 24.04.2008 §163

applicants as “charged with criminal offences” which is in itself sufficient to bring into play the applicability of Article 6 § 2 of the Convention.⁶¹⁶

It is questionable why an explicit decision is required to conclude that the requested individuals were charged with a criminal offence in order to justify the application of Article 6 to the extradition proceedings. It is also not clear why this reasoning is not applicable in all extradition proceedings. Under the EAWFD a person must either be wanted to stand trial (in other words charged with a criminal offence) or to serve their sentence which again is closely related to the criminal charge. These factors seem to satisfy the autonomous meaning of ‘criminal charge’ as defined by the ECtHR.

The consideration in *Angora*, of the EAW being equivalent to extradition simply because it replaces that system is also not compelling. The analogy in *Mamatkulov*, with immigration is for the reasons set out above not persuasive either. However as will be revealed the position is becoming clearer under EU law.

8.2.8 EU

The relevance as to whether the ECHR will consider Article 6 applicable to EAW proceedings in the E-MS is important to the extent that the relationship between the ECHR and the EU remains uncertain. Negotiations and working groups are currently in progress to determine the terms and parameters of this relationship and this is an aspect considered in later sections.

In the meantime the extended scope of Article 47 CFR has already been noted and when considering the Stockholm Roadmap measures, the EU’s own interpretation of what rights are applicable to EAW proceedings will be further noted.

⁶¹⁶*Ismoilov* (n615) §164. See also the case of *P., R.H. and L.L.* (n593) 269 where the Commission considered the applicants awaiting extradition from Austria to the United States as also being “charged with a criminal offence” within the meaning of Article 6 § 2 of the Convention.

If considering in a strict sense the applicability of Article 6 to EAW proceedings, it is arguable that according to existing jurisprudence it is not applicable. The nature of EAW proceedings are automatic, the review conducted is limited, the grounds for refusal are also limited, the decision is not a determination of a criminal charge but on the contrary it would appear that proceedings are more akin to an administrative process. On the other hand great lengths have been taken to clarify that the EAW is different to extradition, at the very least an individual requested under an EAW is charged with an offence as in *Ismailov* or otherwise already convicted of a criminal offence. Whilst in determining whether a procedure falls within the scope of Article 6, the ECtHR will take the domestic classification only as a starting point; this is not however decisive, with the scope being determined on the basis of the Court's own autonomous meaning. It is unclear what weight will be given to the EU's own classification of EAW procedures as falling within the scope of Article 6 when the ECtHR is asked to adjudicate on this specific question.

Despite the fact that, according to the current ECtHR principles, Article 6 is not applicable to extradition – the EU policy is that Article 6 procedural guarantees are applicable to EAW proceedings. In the following Chapter the analysis of the measures, adopted or drafted under the Stockholm Roadmap to protect defence rights, clearly shows the express inclusion of EAW proceedings within their scope.

Given the erroneous asylum analogies, the un-explained proclamations and the contradictions in the ECtHR jurisprudence, the HRs considerations of the EAW proceedings will proceed on the basis of EU interpretation that Article 6 is applicable in its entirety to proceedings in the E-MS.⁶¹⁷

⁶¹⁷ This extension of the applicability of Article 6 guarantees is further considered in the section on the presumption of innocence.

8.3 A Flagrant Denial?

Less controversial is the applicability of Article 6 to criminal proceedings in the I-MS.

The I-MS must ensure their criminal proceedings are compliant with the obligations set out in Article 6.

In relation to the criminal proceedings of the I-MS, the E-MS is also obliged to review and assess these proceedings with the aim of ensuring an individual who leaves their effective control will not be subjected to a ‘flagrant denial’ of their fair trial rights. This obligation is not one which requires a MS to act on its own motion, but would appear to be engaged whether the courts can be said to have known or ought to have known of the risk that a flagrant denial would be faced.

In *Soering*,⁶¹⁸ the Court stated Article 6 holds a prominent place in a democratic society and in particular of the right to a fair trial in criminal proceedings. It did not exclude the possibility that an extradition decision may exceptionally raise an issue under Article 6. It went on to identify this as a situation “where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country...”⁶¹⁹

The E-MS is not asked to examine and verify the I-MS proceedings, however if a ‘flagrant denial of justice’ is shown it is obliged to refuse surrender, or otherwise become complicit in the violation.⁶²⁰ The term ‘flagrant’ depends on the circumstances of individual cases. Whilst there has yet to be a definitive definition, the case law shows the threshold is high and an understanding can be gained of what situations are and are not considered to fit the bill.⁶²¹

⁶¹⁸ *Soering* (n177)

⁶¹⁹ *ibid*, §113

⁶²⁰ *ibid*

⁶²¹ *Mamatkulov* (n565); *Olaechea* (n565); *Mohammed Ali Hassan Al-Moayad v Germany*, 35865/03, Decision 20.02.2007; *Bader and Kanbor v Sweden*, 13284/04, Judgment 8 November

In *Mamatkulov*,⁶²² although the Court found no violation under Article 6, it is interesting to consider their approach. The Court noted the two applicants had been held incommunicado, had been assigned a lawyer by the prosecutor and had not been able to obtain legal representation of their choice, it reiterated its judgment in *Soering* noting that “the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned...[in] light of the information available to the Court when it considers the case”.⁶²³ It held that there may have been reasons to doubt whether they would receive a fair trial in the receiving State, however sufficient evidence did not exist to show the trial irregularities would reach the threshold of a ‘flagrant denial’.⁶²⁴

The *Osman*⁶²⁵ test should be applied to determine whether a violation has occurred on the basis of a situation amounting to a ‘flagrant denial’. In *Al-Moayad*,⁶²⁶ the Court restated the test along this formula, “the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the person concerned.”⁶²⁷ In declaring the application inadmissible, the Court usefully elaborates on the meaning of ‘flagrant denial of justice’ and illustrates how the obtaining of assurances from the receiving State could eliminate any such concerns. It states that, “...the legitimate aim of protecting the community as a whole from serious threats it faces by international terrorism cannot justify measures which extinguish the essence of a fair trial as guaranteed by Article 6”.⁶²⁸

⁶²² *Mamatkulov* (n565)

⁶²³ *Soering* (n177) §90

⁶²⁴ Further consideration of this case will be given in the section on Rule 39.

⁶²⁵ *Osman v UK*, 87/1997/871/1083, Judgment 28.10.1998

⁶²⁶ *Al-Moayad* (n621)

⁶²⁷ *Al-Moayad* (n621) §100. See also *Mamatkulov* (n565) §90; and *Olaechea Cahuas* (n565) §61.

⁶²⁸ *Al-Moayad* (n621) §101

This is a pertinent point to take on board given the origins of the impetus which saw the super-fast adoption of the EAWFD – the threat posed by terrorism. It is also worthy to note that even a serious threat of international terrorism is not enough to displace significantly these rights. Yet the manner in which the EAWFD was adopted sends out the signal that fighting crime⁶²⁹ and security come first and that HRs concerns should not be permitted by MSs to interfere with creating an area of security.

Whilst the EAWFD does make reference to and preserves HRs obligations, the rejection of its partner Framework Decision on procedural guarantees cannot be ignored. When this fact is coupled with the trumping of HRs allegations by MR, it is this that causes legitimate concern to observers that a HRs deficit exists.

An example of a flagrant denial of a fair trial and thereby a denial of justice, is where a person is detained on suspicion without,

access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release ... a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial.⁶³⁰

In *Al-Moayad*, when considering whether a violation had occurred, importance was attached to the meticulous examination of the circumstances by the German authorities and courts. Of relevance was also their “long standing experience of extraditions to the USA, and in particular to the fact that the assurances given to them up to that point had been respected in practice.”⁶³¹ On this basis it was held there was no violation.

An additional example of what may be considered a “flagrant denial” can be found in *Bader and Kanbor* where the Court held deportation of the applicants to Syria would violate their rights under Article 2 and 3. It also noted,

⁶²⁹ Not restricted to terrorist offences but other types of offences which encompass minor offences.

⁶³⁰ *Al-Moayad* (n621) §101

⁶³¹ *ibid*, §104

...in the instant case, it transpires from the Syrian judgment that no oral evidence was taken at the hearing, that all the evidence examined was submitted by the prosecutor and that neither the accused nor even his defence lawyer was present at the hearing. The Court finds that, because of their summary nature and the total disregard of the rights of the defence, the proceedings must be regarded as a flagrant denial of a fair trial.⁶³²

Relevant to considerations whether a ‘flagrant denial of justice’ may be faced upon surrender is whether due process can be assumed to exist in the I-MS. The EAWFD itself relies on the national laws of MSs to guarantee this due process.⁶³³ When determining whether due process will be followed in the I-MS, consideration is to be given to the guarantees under Article 6 ECHR.

Based on the principle of MR, refusal to surrender an individual could not in theory be based on the risk that there will be a flagrant denial of justice in the I-MS since each MS is to have mutual trust in the other’s justice system. However, as already known, the practice is different. In addition to MR, MSs also have an overarching and supreme duty to respect and protect HRs. This is no different in the implementation of the European criminal justice or the EAW. Membership of the EU and ECHR and the principle of MR, act as assurances that rights will be respected in the relevant MS. The case-law to date indicates that MR alone is enough to let the E-MS off the hook in terms of complicity in sending the individual to the I-MS where they may face a ‘flagrant denial of justice’. The fact the individual also maintains their right to individual petition to the ECtHR is seen as an additional safeguard. In this situation, mutual trust is sufficient with no further assessment required.

Whilst in *Radu*, Sharpston accepts that resistance against surrenders on the basis of Article 6 should remain rare, she takes issue with two aspects of the ECtHR test. Firstly the use of the word ‘flagrant’ to describe the requisite violation of Article 6; a term she regards as too undefined and vague to ensure consistent application. She prefers instead

⁶³² *Bader* (n621) §47

⁶³³ EAWFD Recital 12 §2

an assessment of the trial as a whole to establish if the particular deficiency fundamentally destroys the fairness of the trial process.⁶³⁴

Secondly, she does not accept the very high standard of proof which has a place in criminal prosecutions. The ECtHR states that the burden of proof is on the individual to prove beyond a reasonable doubt.⁶³⁵ Sympathising with the position of some strapped individuals who may be forced to rely on State assistance to prove their case she dismisses the high burden as having no role to play when an individual is seeking to show the court that a threat to their rights exist. Instead she prefers a lower threshold, requiring the individual to persuade the court that they have a well-founded fear or case.

Following consideration of the appropriate test for ‘future breaches’, she moves on to consider the position for ‘past breaches’. Essentially she regards them to be the same with the assessment required being whether it ‘fundamentally destroys the fairness of the trial process’ as a whole. Provided that the past breaches are ‘remediable’ there should be no reason to not surrender the individual. This test is of equal application to both Articles 6 and 5 ECHR. Sharpston’s interpretation of what is meant when courts state that ‘notional breaches’ of HRs will not be enough to resist surrender is also sound; essentially it concerns its impact on the trial as a whole and whether the breach can be remedied.⁶³⁶

Having established the applicability of the guarantees to the EAW proceedings in both the I-MS and the E-MS, these guarantees will now be set out in turn and be assessed in light of the issues raised by the EAW.

⁶³⁴ *ibid* §§80-85

⁶³⁵ *ibid* §§74-77

⁶³⁶ *ibid* §§88-89

The right to a fair trial encompasses three aspects: fairness; defence rights; and the right of participation. The guarantees set out under Article 6 will be considered within each of these aspects.

8.4 Fairness

Article 6(1) provides the requisites for a fair hearing.⁶³⁷ In *Perez v France*,⁶³⁸ the ECtHR stressed once again that “the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) restrictively”. It is one that cannot be set aside for expedience and an essential element of the rule of law.

In *Teixeria de Castro*,⁶³⁹ the Court reiterated that the admissibility and assessment of evidence is primarily a matter for the national law and courts to regulate.⁶⁴⁰ The focus of Article 6 is not justice, but it is primarily concerned with fairness. Whilst the guarantees apply specifically to criminal proceedings, the ECtHR has considered them as implicit for a fair trial even beyond the criminal sphere.⁶⁴¹ Aspects of fairness include equality of arms, an adversarial approach and immediacy. The appearance of fair justice being done is of equal importance. Proceedings will be considered as a whole and omission of a defence right will not mean an automatic finding of unfairness.⁶⁴²

⁶³⁷ See Annex 2.

⁶³⁸ 47287/99, [GC] judgment 12.02.04

⁶³⁹ *Teixeria de Castro v Portugal*, 25829/94, Judgment 9.06.1998

⁶⁴⁰ The Court's task is not to assess whether evidence was properly admitted, but to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. In the present case it held that the proceedings were tainted from the beginning by the fact that the evidence obtained by police incitement went beyond the activities of passive undercover agents.

⁶⁴¹ *Albert and Le Compte v Belgium*, 7299/75, 7496/76, Judgment 10.02.1983

⁶⁴² The independence and impartiality of a trial is a core element of fairness and with appearance being as important as the reality. The case of *Hauschildt* (n586) is authority on this right and illustrates how underlying issues may arise between the common and civil systems of adversarial and inquisitorial proceedings.

8.4.1 Within a Reasonable Time

In *Eckle*,⁶⁴³ reiterating the caselaw of both the Commission and ECtHR, set out the 3 criteria by which it is to be assessed whether a reasonable time has been exceeded.

Firstly the “complexity of the case as a whole”, secondly the handling of the case by the national authorities and courts and thirdly, “the applicant’s own conduct.”⁶⁴⁴ Each case will be considered on its own facts in order to ascertain whether the trial has been within a reasonable time. The text of Article 47 of the CFR provides for a “fair and public hearing within a reasonable time by an independent and impartial tribunal”. This will be judged on the basis of the standards set by the ECtHR.⁶⁴⁵

Article 17 EAWFD sets the time limits for EAW proceedings which appear to satisfy the ECHR standards. However not all MSs respect the limits at the appeal stage. For example in the UK there is no special track for EAW appeals to be heard and so they join the queue with appeals on all other matters.⁶⁴⁶ The right to a trial within a reasonable time is also relevant in cases where the alleged crime occurred many years earlier. At the outset the EAW was to be considered as an urgent procedure. In addition to justifying the strict time limits, the urgency is also a reflection of the drafters’ original intention for its use as a fast-track procedure for serious and organised crimes.

Besides the clear obligation for MSs to ensure that this right is respected within their own jurisdiction, it should also be a consideration for E-MSs when determining whether surrender would lead to a flagrant denial of a fair trial. It will be in exceptional circumstances where a breach of this right alone would amount to a violation,

⁶⁴³ *H and M Eckle v Federal Republic of Germany*, 8130/78, Commission Report 11.12.1980. The points at issue were whether the two sets of proceedings, in Cologne and Trier, exceeded a reasonable time under Article 6.

⁶⁴⁴ *ibid.*, §154

⁶⁴⁵ Consideration will be given to the treatment of such cases as urgent before the CJEU and in particular the PPU.

⁶⁴⁶ Although it should be noted that the time taken on appeal in the UK has not been found to violate Article 6 by the ECtHR.

nevertheless states are under an obligation to ensure that the rights of those leaving their jurisdiction continue to be respected.

8.4.2 Presumption of Innocence

Article 6(2) provides the presumption of innocence guarantee providing that before an individual has had the opportunity to present their defence and is proven guilty according to law they must be presumed to be innocent. This means a judicial decision cannot reflect an assumption that he is guilty.⁶⁴⁷ In *Telfner*,⁶⁴⁸ the Court added that legal presumptions are not in principle incompatible with Article 6 and neither is the drawing of inferences from the accused's silence.⁶⁴⁹

Article 6(2) has been held to be applicable to extradition proceedings where they are a direct consequence, and the concomitant, of the criminal investigation pending against an individual. As set out above, in *Ismoilov*,⁶⁵⁰ the Prosecutor declared the applicants should be extradited because they had "committed" acts of terrorism and other criminal offences in Uzbekistan.⁶⁵¹ It concluded that extradition was the concomitant of the criminal investigation and therefore justified the extended scope of Article 6(2).⁶⁵²

Having established Article 6(2) applies to the extradition proceedings the reasoning applied to find a violation of this right is worth analysing. The ECtHR decision to

⁶⁴⁷ *Geerings v the Netherlands*, 30810/03, Judgment 1.03.2007. The case of *Geerings* concerned the confiscation order imposed on the applicant and whether it infringed his right to be presumed innocent under Article 6(2) since it was based on a judicial finding based on offences for which he had been acquitted in the substantive criminal proceedings that had been brought against him. Given this fact, the order is based on a presumption of guilt. "*It amounts to a determination of the applicant's guilt without the applicant having been 'found guilty according to law'*" (§50). The Court reiterated that this applies to both judicial decisions and statements by public officials (*Daktaras v Lithuania*, 42095/98, Judgment 10.10.2000). This right also has implications to ensure that a person's guilt is determined through a fair trial. This means that the burden of proof is on the prosecution to prove on the basis of evidence and not mere assumptions.

⁶⁴⁸ *Telfner v Austria*, 33501/96, Judgment 20.03.2001

⁶⁴⁹ The present case concerned speculations by the District Court and the Regional Court that the applicant was under the influence of alcohol. This the Court held contributed to the impression that the courts had a preconceived view of the applicant's guilt.

⁶⁵⁰ *Ismoilov* (n615). See also *Gaforov v Russia*, 25404/09, judgment 21.10.2010 §208 referring to *Ismoilov*.

⁶⁵¹ *Ismoilov* (n615). §168

⁶⁵² *ibid*, §164

extradite is not itself in breach of the presumption of innocence⁶⁵³ and this was not what the applicants complained of but rather the reasoning contained in the extradition decisions. In the present case the ECtHR considered “the wording of the extradition decisions amounted to a declaration of the applicants' guilt which could encourage the public to believe them guilty and which prejudged the assessment of the facts by the competent judicial authority in Uzbekistan”⁶⁵⁴ and for these reasons violated Article 6(2) .

In *Hammern*,⁶⁵⁵ whilst again the ECtHR did not consider the compensation proceedings as concerning a criminal charge, the issue was whether they were “nevertheless was linked to the criminal trial in such a way as to fall within the scope of Article 6 § 2”.

The willingness seen in the ECtHR extending the scope of Article 6(2) is fascinating, least of all because of the manner in which it has reasoned the extension. The first step is finding that the proceedings did not fall within the autonomous meaning of ‘criminal charge’ thereby meaning Article 6 was not applicable to them. Despite this the ECtHR then proceeds to find that in fact, a guarantee under Article 6 is applicable on the sole basis that a close link is found to exist. To be precise extradition proceedings were a direct consequence and the concomitant, of the criminal investigation pending against the applicants. It is curious why this line of reasoning has not been extended to the other guarantees set out under Article 6. There is no reason why it cannot be. Extradition proceedings will always have a close link to the criminal proceedings since they are a direct consequence of them. As such any disregard of the guarantees set out by Article 6 could be deemed to affect the fairness of the proceedings as a whole. Whether it is the lack of legal assistance upon arrest under the EAW which is now required by *Salduz*, or

⁶⁵³ *ibid*, §167 citing *X. v. Austria*, 1918/63, Commission decision of 18.12.1963, 492

⁶⁵⁴ *Ismoilov* (n615)§169

⁶⁵⁵ *Hammern v. Norway*, 30287/96, 11.02.2003 §42. See also *Y v. Norway*, 56568/00, Judgment 11.02.2003

the lack of participation permitted at the hearing, it all has a close link to the criminal proceedings and to the fairness of the proceedings.

In relation to the EAW, the criminal justice systems of the MSs are merged so that the processes are integrated to deal with transnational criminals. EAW proceedings are regarded as an integral part of the criminal proceedings; EAWs are treated in the same way as a domestic arrest warrant. This integrated system furthers the argument for procedural guarantees to apply to EAW proceedings. As will be shown in the next part, the measures adopted under the Stockholm Roadmap have explicitly extended the scope of some of these rights to the EAW proceedings.

8.4.3 Right to Silence

It may come as a surprise to some that the right to silence, and the related right not to incriminate oneself, are not expressly stated in the ECHR. It has however been read into Article 6(2) by the ECtHR and is regarded as lying “at the heart of the notion of a fair procedure”. In *Funke*,⁶⁵⁶ the Court found a violation of Article 6, stating that, special features of national law cannot justify infringement of the right of those charged with a criminal offence to remain silent and to not incriminate themselves.

The right to silence is linked to the prevention of improper compulsion or coercive measures being used against an individual to solicit incriminating evidence. The Court will take a close look at whether the essence of the right has been extinguished through the acts of the authorities. In the case law, the court has distinguished between compelling an individual to incriminate oneself and drawing inferences from silence.⁶⁵⁷ In assessing whether the right has been breached, the court will have regard to the whole process, taking into account the safeguards in place and the extent to which the evidence

⁶⁵⁶ *Funke v France*, 10828/84, Judgment 25.02.1993

⁶⁵⁷ *John Murray v UK*, 18731/91, [GC] Judgment 8 February 1996

obtained is used in subsequent proceedings.⁶⁵⁸ On this point it should be noted that the material obtained in such a manner need not be used in proceedings for a breach of the right against self-incrimination to be found.⁶⁵⁹

The relationship between the right to silence and a fair trial is summarized in *Panovits*⁶⁶⁰ where the Court acknowledged that, “contributing to the avoidance of miscarriages of justice...the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.” It provides that it protects against improper compulsion by authorities⁶⁶¹ and presupposes that the prosecution will prove their case without resorting to obtaining evidence through coercive or oppressive methods.

At the EU level, the presumption of innocence is clearly set out in Article 48(1) CFR. It is also listed amongst the rights of which individuals must be informed in the letter of rights introduced under the Stockholm Roadmap.⁶⁶² Interestingly the right to silence was not included in the original draft of the Directive on the right to information which introduced the letter of rights requirement. The reason for this was because of a misconception that it did not exist in all MSs and therefore the entire Directive would not be supported. In particular the misconception existed in relation to the UK, where the right exists but as in other MSs it is not absolute.⁶⁶³

⁶⁵⁸ *Heany and McGuinness v Ireland*, 34720/97, Judgment 21.12.2000

⁶⁵⁹ *Marttinen v Finland*, 19235/03, Judgment 21.04.2009

⁶⁶⁰ *Panovits v Cyprus*, 4268/04, Judgment 11.12.2008

⁶⁶¹ Referring to *John Murray* (n657) §45 and *Funke* (n656)

⁶⁶² EU, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01*, OJ C 295/1 4.12.2009 (Stockholm Roadmap). A critical analysis of the Stockholm endeavours will be considered in greater detail in the next Part. In the present Chapter relevant Stockholm measures will only be highlighted.

⁶⁶³ ERA Conference, *Guaranteeing Procedural Safeguards in the EU – A First Step*, Trier, 18-19.11.2010. The proceedings were conducted under Chatham House Rules.

The Commission in its Explanatory Memorandum accompanying the Proposal for the Directive on the right to information in criminal proceedings,⁶⁶⁴ explicitly states that “the Directive makes applicable the procedural guarantees contained in Articles 47 and 48 of the Charter and Articles 5 and 6 ECHR to surrender proceedings based on a European Arrest Warrant”.⁶⁶⁵

Thus if any doubt existed as to the application of Article 6(2) to the EAW, it is explicitly stated in the Directive. Besides the obvious application to the EAW as set out above, this right is also related to the right to legal assistance, to prevent self-incrimination by coercion and to enable a defendant to make an informed decision as to whether to remain silent. Such statements are likely to be made upon arrest, which in the instance of an EAW will be by the E-MS, further highlighting the importance of its respect at all stages of the proceedings.

8.5 Defence Rights

8.5.1 Art 6(3)

Also related to the assessment of whether a “flagrant denial” exists, is the respect for defence rights. These are set out in Article 6(3) and many of them are reflected in the CFR as well as being encompassed into the Stockholm Roadmap.

The right of defence is set out in Article 48(2) CFR and is explained as having the same meaning as Article 6(2) and (3) ECHR. As previously established, the defence rights set out under the ECHR, although under the ECHR jurisprudence these only apply to proceedings determining a ‘criminal charge’, within the EU legal order these guarantees have an extended scope applying to MR measures such as the EAWFD. This

⁶⁶⁴ Commission, *Explanatory Memorandum, Proposal For a Directive Of The European Parliament and of the Council on the Right to Information in Criminal Proceedings*, Com(2010) 392 Final, 20.07.2010

⁶⁶⁵ *ibid*, §21

is further confirmed by the Stockholm Roadmap and subsequent measures which embark on setting down these defence rights as minimum EU-wide standards.

8.5.2 Right to be Informed

The right to understand the charge against you is found under Article 6(3)(a) ECHR and reflected in Article 48 CFR. The jurisprudence of the ECtHR on this point also includes the language of the accused⁶⁶⁶ and details of the accusation.⁶⁶⁷ The right to be informed is related to the need for adequate time to prepare. Reid lists the key information which is to be included as the material facts and the legal classification.⁶⁶⁸

The right to information encompasses the right to know the reasons for the arrest, the right to legal assistance and the right to access the case documents. Needless to say all these rights are imperative for the effective preparation of one's defence. With respects to information for the reason of their arrest, it should be noted that there is a positive obligation on the authorities to provide this and not in a passive manner, ensuring the individual understands the information. However, the manner in which this information is provided, is largely left to the national authorities to decide for themselves. It is this discretion which leads to discrepancies in reality.

In *Mattochia*,⁶⁶⁹ the Court stated that, there is the need to pay special attention to the notification of the accusation since it is from this point that an individual is put on notice "of the factual and legal basis of the charges against him". Additionally, the accused must be informed "promptly" and "in detail" of the material facts "which are at the basis of the accusation, and of the nature of the accusation, namely, the legal

⁶⁶⁶ *Kamasinski v Austria*, 9783/82, Judgment 19.12.1989

⁶⁶⁷ *Mattochia v Italy*, 23969/94, Judgment 25.07.2000

⁶⁶⁸ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (3rd Edition), Sweet & Maxwell, 2007

⁶⁶⁹ *Mattochia* (n667) §59

qualification”. This is considered by the ECtHR as an essential prerequisite for ensuring that the proceedings are fair.

With respects to the right be informed of their defence rights, this is not provided for in the ECHR itself, but the obligations are clearly set out in the case law of the ECtHR.

Individuals must be informed of their right to legal assistance and, where applicable, to legal aid. It is not enough for this information to be provided in writing alone, since the individual must also understand their rights.⁶⁷⁰ In *Panovits*,⁶⁷¹ the ECtHR noted that the passive approach taken by the authorities was not sufficient to fulfill their positive obligation to provide the applicant with the necessary information enabling him to access legal representation. The ECtHR accordingly found that especially since he was a minor at the time and not assisted by a guardian during questioning, the lack of sufficient information on his right to consult a lawyer before being questioned , was a breach of his defence rights.⁶⁷²

Finally, under this heading, is the issue of disclosure. It is clear that an individual has the right to access documents held by the prosecution both in his favour and against him.⁶⁷³ What is less clear is the exact point at which he should have access during the proceedings. The reality is that this will be determined on a case by case basis with the essential determining factor being whether sufficient time was allowed for the preparation of his defence. This right also applies to pre-trial stages and is also found under Article 5 in terms of challenging the lawfulness of their detention.⁶⁷⁴ This right is

⁶⁷⁰ See *Panovits* (n660); and *Pishchalnikov v Russia*, 7025/04, Judgment 24.09.2009

⁶⁷¹ *Panovits* (n660)

⁶⁷² *ibid* §73

⁶⁷³ *Edwards and Lewis v UK*, 39647/98, 40461/98, Judgment 27.10.2004

⁶⁷⁴ *Garcia Alva v Germany*, 23541/94, 13.02.2001; *Mooren v Germany*, 11364/03, [GC] Judgment 9.07.2009

not absolute and can be restricted in the interests of national security, to protect witnesses and other such grounds.⁶⁷⁵

Article 6(3) also requires that an individual is kept informed and given advance notice of any events so as to avoid being subjected to anxiety or uncertainty.⁶⁷⁶ The right to be informed of one's rights is not explicitly required by the ECHR, however the Commission research has concluded that it would make "a considerable difference if information was given to all suspects and accused person throughout the EU in a similar way".⁶⁷⁷ MSs have already refused to surrender individuals on the ground that there was a likelihood their right to a fair trial would be violated.⁶⁷⁸ In its impact assessment, the Commission sets out the current problem of insufficient information and the related consequences. It bases its conclusions on research reports⁶⁷⁹ and CPT reports⁶⁸⁰ as well as ECHR jurisprudence.⁶⁸¹

The description of the facts in an EAW should be sufficient so that the requested person can "understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness".⁶⁸² Due to the inevitable delays in obtaining additional information from the I-MSs, Ginter believes that an EAW "should face stricter standards than have been applied by the Court to the information provided in domestic cases. In domestic cases there is normally less hardship for the

⁶⁷⁵ *Dowsett v UK*, 39482/98, Judgment 24.06.2003

⁶⁷⁶ *Chamaiev and others v Russia*, 36378/02, Judgment 12.04.2005

⁶⁷⁷ Commission Staff Working Document, *Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*, COM(2010) 392 final 20.07.2010, 7

⁶⁷⁸ *ibid*, 11 referring to Case AU7667, *Rechtbank Amsterdam* (judgment 4.01.2006); *Lisowski v Regional Court of Bialystok* [2006] EWHC 3227 (Admin).

⁶⁷⁹ Taru Sproken and others, *EU Procedural Rights in Criminal Proceedings*, JLS/2008/D3/002

⁶⁸⁰ CPT, *The CPT Standards – "Substantive" sections of the CPT's General Reports*, CPT/Inf/E (2002) 1 Rev. 2009; CPT, *Report Germany*, CPT (2006) 36, adopted on 7.07.2006

⁶⁸¹ Citing several ECtHR cases including the following: *Padalov v Bulgaria*, 54784/00, Judgment 10.08.2006, §54; *Talat Tunc v Turkey*, 32432/96, Judgment 27.03.2007; *Salduz* (n605); *Panovits* (n660); *Mooren* (n674).

⁶⁸² *Fox, Campbell and Hartley v UK*, 12244/86, 12245/86, 12383/86, Judgment 30.08.1990; *Murray v UK*, 14310/88, Judgment 28.10.1994; *Ladent v Poland*, 11036/03, Judgment 18.03.2008

person arrested and there are more swift avenues for providing extra information”.⁶⁸³

Article 11 of the EAWFD provides that the rights of the requested person include the right to be informed of the EAW and of its contents. Additionally, the text of the EAWFD itself under Article 8 requires amongst other things to include the nature and legal classification of the offence, together with a description of the circumstances in which the offence was committed. This complies with the ECHR standards, however the practice and case law show that this has been interpreted and implemented in a way which is contrary to the ECHR.

Related to the description of facts is also the question of whether the full text of the relevant provisions for which the person is requested should also be included. The German,⁶⁸⁴ Dutch⁶⁸⁵ and UK⁶⁸⁶ Courts have all ruled that provision numbers are sufficient because to require the full text would be counter to the aims of the EAW to simplify and speed up the process as well as being detrimental to mutual trust. However, Ginter is of the opinion that listing the provision number alone is not sufficient to satisfy the ECHR jurisprudence which requires that a person be told in “non-technical language that he can understand”.⁶⁸⁷

The question is not only whether the requested person can understand what he is accused of, but also his lawyer, who in all likelihood will not possess the linguistic capabilities to find, read and comprehend the offence relating to the provision number provided.

⁶⁸³ Jaan Ginter, ‘Chapter 1: The Content of a EAW’ in Keijer and van Sliedregt (n**Error! Bookmark not defined.**)

⁶⁸⁴ Oberlandesgericht Stuttgart, 26.10.2006, 3 Ausl 52/06

⁶⁸⁵ Supreme Court, 8.07.2008, LJN BD2447

⁶⁸⁶ *Dabas v High Court of Justice Madrid* [2007] UKHL 6

⁶⁸⁷ Ginter (n683)

8.5.3 Adequate time

Article 6(3)(b) sets out the need for adequate time and facilities. A criminal charge needs to be brought before this provision is engaged. The Court has held that procedural guarantees such as adequate time and facilities to prepare are elements necessary for a fair trial as a whole, together with the principles of equality of arms and the ability to participate effectively. As such procedural guarantees are relevant to all judicial proceedings.

The case law indicates that whether adequate time has been given will be assessed on the facts of individual cases. In *Öcalan*⁶⁸⁸ the Court found a violation where the applicant had been given only 2 weeks to prepare for a complex trial with a 17 000 page file. In contrast, in *Kremzow*⁶⁸⁹ the Court found that 3 weeks to draft reply to 47 page document was adequate time.⁶⁹⁰

The short timeframe set out by the EAW may in fact interfere with the right to adequate time to prepare ones defence. However in practice the Courts in the UK at least appear willing to grant extensions/stays where necessary.⁶⁹¹

8.5.4 Legal Representation and Legal Aid

Article 6(3)(c) provides for the right to legal representation and if appropriate legal aid and Article 48 CFR guarantees the right to defend oneself. This right applies to the trial,

⁶⁸⁸ *Öcalan v Turkey*, 46221/99, [GC] Judgment 12.05.2005, Chamber Judgment 12.03.2003

⁶⁸⁹ *Kremzow v Austria*, 12350/86, Commission Report 20.05.1992

⁶⁹⁰ In *Hadjianastassiou v Greece* (12945/87, Judgment 16.12.1992), the time limit for lodging grounds of appeal expired before the applicant knew the substance of the court's decision. The Court held that it was not enough that parts were orally provided. National courts had to "indicate with sufficient clarity the grounds on which they based their decision". Whilst in *Zoon v the Netherlands* (29202/95, Judgment 7.12.2000), the Court held that although the applicant was not provided with the full judgment, parts/excerpts had been provided and the appeal was not against the first instance judgment, but the charge. Accordingly no violation of Article 6 was found. One of the factors is the need to request adjournments at the time the difficulty is encountered.

⁶⁹¹ Discussions held under Chatham House rule in the presence of the author.

in particular where without it accessibility to justice would be “*theoretical and illusory*”.⁶⁹² Factors to be taken into account include the complexity of the case.

As will be shown Article 6 and in particular the right to legal representation and assistance, is of equal importance at the initial stages of proceedings as it is during the trial stage.⁶⁹³ This includes the right to confidential communication with one’s lawyer. In *Brennan*, the Court held that the presence of a police officer “during the applicant’s first consultation with his solicitor infringed his right to an effective exercise of his defence rights and that there has been, in that respect”.⁶⁹⁴

Consultation with one’s lawyer should be in private.⁶⁹⁵ The individual has a right not only to communicate with his lawyer, but also with his family members, employer and consular authorities.⁶⁹⁶

The right to legal assistance also includes the right to defend oneself, to choose one’s own lawyer and in certain circumstances the right to legal aid. In *Biba*⁶⁹⁷ the Court held that where necessary a legal representative should be provided for free. This does not prohibit the possibility that the defendant may have to repay later or upon conviction; free means free at the time of trial. In *Croissant*⁶⁹⁸ the Court held that an order to reimburse the costs of the applicant’s lawyer was not incompatible with Article 6. A lawyer must be provided to a defendant where there is financial eligibility – this is generally for domestic authorities to evaluate although the ECtHR will review to see if it is arbitrary.⁶⁹⁹ The right to defend oneself is not absolute and if the circumstances of

⁶⁹² *Airey v Ireland*, 6289/73, Judgment 9.10.1979 ; *Steel and Morris v UK*, 68416/01, Judgment 15.02.2005

⁶⁹³ *Magee v UK*, 28135/95, Judgment 6.06.2000

⁶⁹⁴ *Brennan v UK*, 39846/98, Judgment 16.10.2001, §63

⁶⁹⁵ *Niemietz v Germany*, 13710/88, Judgment 16.12.1992

⁶⁹⁶ Under the Stockholm Roadmap (n662) this will be set out by Measure D.

⁶⁹⁷ *Biba v Greece*, 33170/96, Judgment 26.09.2000

⁶⁹⁸ *Croissant v Germany*, 13611/88, Judgment 25.09.1992

⁶⁹⁹ *RD v Poland*, 29692/96, 34612/97, Judgment 18 December 2001

the case require it a lawyer can be appointed.⁷⁰⁰ In *Artico*,⁷⁰¹ where the Court held that if the interests of justice so command, legal assistance should also be provided for free. Given the economic impact of this right, MSs are largely allowed to set their own limits and rates for the legal aid they offer. These decisions must however be guided by the ECtHR principles.

In *Pischalnikov*⁷⁰² the Court determined that the right to a lawyer can be waived by the individual, but it must be both voluntary and informed. Further, whilst individuals have a right to choose their lawyer when they are paying for them, this right is not extended to a legal aid lawyer.

Consultation with ones' lawyer and others is also reflected in the "Letter of Rights" under Measure B of the Stockholm Roadmap. The right to legal representation and legal aid is to be addressed by Measure C under the Stockholm Roadmap.

Article 11 EAWFD provides that the requested person "shall have the right to be assisted by legal counsel...in accordance with the national law of the executing Member State." The focus of the EAWFD is not the practical reality of this right in a MS, but rather the theoretical reliance on the national law. This would suggest that even if the right as applied by a MS falls below the ECHR standards set out above, this concern does not fall within the framework of the EAW. By way of example, the *Salduz* case discussed below together with the reactions and responses of certain MSs, would suggest that legal assistance will be available at different stages of the EAW procedure and in some MSs certainly not from the first interrogation by police.

⁷⁰⁰ *Croissant* (n698)

⁷⁰¹ *Artico v Italy*, 6694/74, Judgment 15.05.1980

⁷⁰² *Pishchalnikov* (n670)

8.6 Pre-Trial

After years of uncertainty as to the point from which an individual has a right to legal assistance,⁷⁰³ has gone some way in clarifying the situation. Referring to the CPT recommendations the ECtHR noted the importance of having legal assistance during police interrogation as a safeguard against ill-treatment and also self-incrimination. Individuals have a right to legal assistance from the moment they become suspects.

In *Salduz*,⁷⁰⁴ the applicant complained that his defence rights had been violated because he had been denied access to a lawyer during his police custody. The Court reiterated that, national laws can attach “consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings.”⁷⁰⁵

The ECtHR underlined the importance of the investigation stage for the preparation of the criminal proceedings. At this stage an accused finds themselves in a vulnerable situation, amplified by the complexity of the rules governing evidence gathering. In the ECtHR’s view “this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.” The ECtHR also noted the recommendations of the CPT where it “repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment.” Any restriction should be “clearly circumscribed and its application strictly limited in time.” It highlighted that this is of particular importance in cases of serious charges.⁷⁰⁶

The ECtHR thus concluded that to ensure the right to a fair trial remains practical and effective “as a rule, access to a lawyer should be provided as from the first interrogation

⁷⁰³ *Salduz* (n605)

⁷⁰⁴ *ibid*

⁷⁰⁵ *ibid*, §52

⁷⁰⁶ *ibid*, §54

of a suspect by the police”. The right can be exceptionally restricted, however it must not “unduly prejudice the rights of the accused”.⁷⁰⁷ For example, defence rights would be irretrievably prejudiced where an incriminating statement is made during interrogation in the absence of a lawyer is used for a conviction.

In *Pishchalnikov*,⁷⁰⁸ one of the complaints of the applicant concerned legal representation, in particular the denial of access to a lawyer during the first few days of his police custody; the ineffective representation provided during the trial by the legal aid counsel; and the lack of legal assistance before the court of appeal. Citing its decision in *Salduz* the ECtHR held that Article 6 is applicable to pre-trial stages in particular where the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply.⁷⁰⁹

The ECHR rights are dynamic and continually evolving; the right to a lawyer under Article 6(3) has now been extended to include having one present during police interrogation. *Salduz*,⁷¹⁰ *Panovitis*⁷¹¹ and *Pishchalnikov*⁷¹² highlight the importance of guaranteeing a fair trial from the start of the process, including the first time an individual is interrogated as a suspect by the police.

Salduz,⁷¹³ has been adopted by the EU as the benchmark and this is reflected in the ‘letter of rights’ under the Stockholm Roadmap. *Salduz* clarified this position, stating that the guarantees applied at the pre-trial stages and relying on CPT reports to highlight the importance of them being respected at the early stages and the irreparable damages which may occur in their absence because of the vulnerable situation an individual finds themselves. These are only heightened when they are arrested in a foreign country whose language and legal system they may not understand.

⁷⁰⁷ *ibid.*, §55

⁷⁰⁸ *Pishchalnikov* (n670)

⁷⁰⁹ *Pishchalnikov* (n670). See also *John Murray* (n657) and *Magee* (n693)

⁷¹⁰ *Salduz* (n605)

⁷¹¹ *Panovits* (n660)

⁷¹² *Pishchalnikov* (n670)

⁷¹³ Recently confirmed in the case of *Hüseyin Habip Taşkın v Turkey*, 5289/06, Judgment 11.02.2011

For an individual their involvement in the EU criminal justice procedure will often begin at the point of arrest or questioning by the E-MS. This is the first time they are likely to be aware that an arrest warrant has been issued for them. For this reason their right to be informed promptly and in a language they understand the reason for their arrest is important. It is of equal importance that they are entitled to legal assistance before any questioning by the police. A decision to agree to surrender has a number of implications which an individual may not fully appreciate without legal advice. Article 13 EAWFD provides that consent to surrender must be made “voluntarily and in full awareness of the consequences”. Given that such a decision may not be revoked, unless MS provides otherwise, it is important for such a decision to be made with legal assistance. To this end the right to legal counsel is provided for in Article 13(2) and this time without the usual qualification – ‘in accordance with national law’. However there is no mention of the right to legal aid to cover the cost of counsel and as such the right in practice may in fact be illusory.

8.7 Right to Participate

As has been seen above, cases concerning trials in absentia are related to the issue of effective participation. An individual must be given the opportunity to plead his case in court. Effective participation is key to the practical implementation of defence rights.

Cape divides the relevant rights into four categories,

the right to investigate facts, or to seek exculpatory evidence; the right to participate in the proceedings, for example, by being present at during investigative acts and hearings, which is closely related to the equality of arms requirement; the right to adequate time and facilities for preparation of the defence; and the right to examine witnesses and experts.⁷¹⁴

⁷¹⁴ Ed Cape and others, *Effective Criminal Defence in Europe*, Ius Commune: European and Comparative Law Series Volume 87, 26

In *Artico*⁷¹⁵ the ECtHR held that participation in proceedings needs to be practical and effective. The right to be present in the court is not an absolute right,⁷¹⁶ so where only points of law are heard and the hearing is attended by their lawyer this will not be a violation.⁷¹⁷

In *Timergaliyev*,⁷¹⁸ the ECtHR stated that, the right to be present at one's trial is intimately connected with the ability to effectively participate in the proceedings, not only by being present but also to hear and follow proceedings. Effective participation presupposes that the accused understands the nature of proceedings and what is at stake. He should be able to relay to his lawyer his own version of events, points of disagreement and raise points to be put forward in his defence.

Alternatively if the individual has either waived this right by deliberately not attending the trial, this is also not necessarily a violation. However, a lawyer appointed to represent the accused must be afforded the opportunity to do so. In *Lala*⁷¹⁹ the applicant complained that his lawyer was not allowed to conduct the defence in his absence (the trial having been held in absentia). The ECtHR found that there had been a violation of Article 6 since the right to defend oneself through legal assistance is not only for defendants who are themselves present at the trial but includes allowing their lawyers to present their defence.

8.7.1 Equality of arms

Equality of arms is an element of the right to a fair trial, requiring that both sides are given an equal opportunity to present their case including having access to the case

⁷¹⁵ *Artico* (n701)

⁷¹⁶ *Colozza v Italy*, 9024/80, Judgment 12.02.1985

⁷¹⁷ *Kremzow* (n689)

⁷¹⁸ *Timergaliyev v Russia*, 40631/02, Judgment 14.10.2008

⁷¹⁹ *Lala v the Netherlands*, 14861/89, Judgment 22.09.1994

documents and to question witnesses. As stated by the Court in *Salduz*, these guarantees are of equal importance in pre-trial stages.

The case of *Edwards and Lewis*,⁷²⁰ concerned entrapment and non-disclosure, on public interest grounds, of pertinent evidence⁷²¹ which would have assisted the applicants in proving entrapment. The ECtHR stated that the “...right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”⁷²² Reiterating that it was not the ECtHR’s role to assess decisions on the admissibility of evidence by national courts, it was still in a position to,

...scrutinise the decision-making procedure to ensure that, as far as possible, the procedure complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.⁷²³

In *Öcalan*,⁷²⁴ the chain of events which lead to the applicant’s eventual appearance before the Turkish courts are well known. The case is a prime example of a lack in equality of arms. The ECtHR held that it could not “...accept that the replacement of the military judge before the end of the proceedings dispelled the applicant's reasonably held concern about the trial court's independence and impartiality”.⁷²⁵ The applicant complained that Article 6 (1)-(3) had been infringed, because of the difficulties in obtaining assistance from his lawyers, gaining access to the case file and other information from the prosecution and difficulty in calling defence witnesses. There were also allegations of the judges being influenced by the media.⁷²⁶ The security forces, a public prosecutor and a judge of the National Security Court refused the applicant a

⁷²⁰ *Edwards and Lewis v UK*, Applications nos. 39647/98 and 40461/98, [GC] Judgment 27.10.2004, Chamber Judgment 22.07.2003

⁷²¹ Whilst the rules of evidence are beyond the scope of this thesis, it should be noted that it is an area the EU is working on.

⁷²² *Edwards and Lewis* (n720)

⁷²³ *ibid*

⁷²⁴ *Öcalan* (n688)

⁷²⁵ *ibid* §118

⁷²⁶ *ibid* §119

lawyer during police questioning whilst in police custody for seven days; during which time he made several incriminating statements which later became crucial elements of the prosecutor's charge and a significant contributors to his conviction. Despite not waiving his right to a lawyer and his lawyers seeking permission to visit, the authorities refused access. The ECtHR held that "to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence to which the accused is entitled by virtue of Article 6."

Once access to a lawyer was permitted, meetings between the applicant and his lawyers were within hearing range of the security forces. The ECtHR stated that given an aim of the ECHR was to guarantee practical and effective rights, the inability of a lawyer to confer with his client, receive instructions confidentially and to provide assistance without surveillance meant that much of the usefulness of his assistance was lost. Although the right is not absolute, in the present case the Court found that his defence rights had been infringed.

Restrictions were placed on the frequency of visits from his lawyers to two one-hour visits per week. The Court held that on the basis of the complexity of the case and the voluminous case files, it was not justified. In addition Mr Öcalan, had 20 days to examine a case file containing 17,000 pages and his lawyers were not able to provide him with any documents before submitting their comments on the prosecution evidence. The Court held that this added to the difficulties he encountered in preparing his defence for the above reasons the ECtHR held that the trial was unfair and "that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the principle of a fair trial".⁷²⁷

⁷²⁷ *ibid* §148

Whilst the unfortunate chain of events that occurred in Mr Ocalan's case will rarely be reproduced in proceedings before the courts of MSs, it highlights the different elements that can go wrong. Some of these are tackled by the Stockholm Roadmap and in particular Measure B in terms of the right to access the case documents and also Measure C on the right to a lawyer.

8.8 Trials in Absentia

In *Einhorn*,⁷²⁸ the applicant had been arrested in 1979 on suspicion that he had murdered his girlfriend, whose mummified body had been found in his home 2 years after she had gone missing. In 1981, whilst the proceedings were taking place he left the US. A trial was held in his absence and in 1993 he was found guilty. In 1997 the US asked France to extradite him so that he could serve his sentence of life imprisonment. In the present case, the law was in place which in principle provided that he would have a retrial and the applicant failed to show "*substantial grounds for believing*" that the denial of justice he would face would be "flagrant" and the US "cannot be said not to be a State based on the rule of law". France could in good faith extradite the applicant. The ECtHR confirmed that a denial of justice undoubtedly occurs where an individual convicted in absentia, is not able to obtain a fresh determination of the charge (in fact and law), when it has not been unequivocally shown that they waived their right to be present and defend themselves.⁷²⁹

Other guarantees inherent in a fair trial such as equality of arms⁷³⁰ and the right to participate in the trial,⁷³¹ are inherently missing from a trial in absentia where relevant due process has not been followed.

⁷²⁸ *Einhorn v France*, 71555/01, Decision 16.10.2001

⁷²⁹ *ibid* §33

⁷³⁰ *Edwards and Lewis* (n720)

⁷³¹ *Sejdovic v Italy*, 56581/00, [GC] Judgment 1.03.2006, the right to participate can only be waived in an unequivocal manner.

In *Sejdovic*,⁷³² the applicant had been convicted in absentia and complained that he had not been given the opportunity to present his defence. The applicant had not been formally informed of the trial since he had become untraceable before the authorities had even had the opportunity to detain him, and as such could not be considered as having unequivocally waived his right to trial. A lawyer was appointed to represent him at the trial but he was absent. A trial in absentia will not be automatically contrary to Article 6 if the individual is entitled to a retrial with a fresh determination on the facts and law. The ECtHR gives states a wide margin of appreciation to determine the means as the result is achieved, with the right to be present at either the original or re-trial hearing ranking as one of the essential requirements of Article 6. As such,

...the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a “flagrant denial of justice” rendering the proceedings manifestly contrary to the provisions of Article 6 or the principles embodied therein.⁷³³

In the present case the Court held that, it could not be shown that he had waived his right and did not have the opportunity of obtaining a fresh determination of the merits of the charges against him by a court which had heard him in accordance with his defence rights. Accordingly a violation of Article 6 was found.

As stated above the ECtHR requires that a fresh determination of the merits is available in all instances where the trial was held *in absentia* without the defendant's knowledge. Article 5(1) EAWFD addressed the issue of trials in absentia, it states that where a person has been convicted when he had not been informed of the date and time of the hearing, his surrender may be subject to the I-MS giving an assurance that he will have the opportunity to apply for a re-trial of the case. This has been deleted and the

⁷³² *ibid*

⁷³³ *ibid* §84

EAWFD amended by the Council Framework Decision relating to trials in absentia⁷³⁴ which inserts Article 4a. This sets out the grounds for non-recognition of decisions rendered following a trial in absentia and the conditions for its application.

It is clear that the conditions required by Article 5(1) EAWFD fell below the standards the ECtHR demands. Obtaining an assurance, as indicated by the “may be subject to”, is optional and building upon the principle of MR, under EU law, it is acceptable if the opportunity exists in the national law. This availability of the “opportunity to apply for a retrial” also falls below ECHR standards, since what is required is the entitlement to a retrial with a fresh determination on the facts and law.

The amended EAWFD has taken a step in the right direction in that the I-MS has to confirm that the individual will be “expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed”. However this assurance found in the amended EAW request form has a narrower scope than anticipated by the ECHR in that the E-MS has no ability or opportunity to assess the realities which will be faced by the individual upon surrender. They are to trust the assurance given by the I-MS through a simple tick on the request form.

The CJEU sends a number of messages through its judgment in *Melloni*.⁷³⁵ The case concerned an EAW request for the execution of a judgment *in absentia*, the referring court wanted to know whether Article 4a(1) precludes national judicial authorities from making a surrender conditional on the conviction being open for review in order to ensure that their defence rights are guaranteed. If this is the case, is the provision

⁷³⁴ Trials in Absentia FD (n120)

⁷³⁵ *Melloni* (n122)

compatible with the right to a fair trial under the CFR and if so does Article 53 CFR not then allow a state to afford greater protection by making surrender conditional.

The CJEU ruled that, the EAWFD harmonized the grounds for non-execution and the exhaustive list provided in Article 4a(1) “is incompatible with any retention of the possibility for the executing judicial authority to make the execution conditional on the conviction in question being open to review in order to guarantee the rights of the defence of the person concerned.”⁷³⁶ Referring to the Opinion of the Advocate-General, the CJEU concludes that this does not infringe the defendant’s rights. The reasoning of the Advocate-General is that the adoption of Framework Decision 2009/299 sought to remedy the defects in Article 5(1), including the enhancement of procedural rights. However it is also clear that the actual focus of the amendment was legal certainty, allowing the E-MS to determine the adequacy of the assurance created uncertainty which may reduce the effectiveness of the MR mechanism. Thus the need to refine the definition of common grounds and whilst permitting surrender in spite of a trial in absentia it respects defence rights.⁷³⁷ For these reasons the E-MS is (according to the CJEU) precluded from making a surrender conditional on the conviction rendered in absentia being open to review. The problem with sub-sections (a) and (b) is the nature of the preclusion; it is mandatory.⁷³⁸ This then begs the question of where are the additional safeguards (besides the free will of a waiver) set out in the opinion, “if it is to be effective for [ECHR] purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance[...]Furthermore, it must not run counter to any important public interest.”⁷³⁹ It is equally important to show that the consequences of

⁷³⁶ *ibid* §44

⁷³⁷ *ibid* §§65-70

⁷³⁸ *ibid*, Opinion of Advocate-General Bot §28

⁷³⁹ Referring to ECtHR *Sejdovic v Italy* (n731) §86, and *Haralampiev v Bulgaria* (29648/03, Judgment 24.04.2012) §32. See also ECtHR, *Idalov v Russia* (5826/03, Judgment 22.05.2012) §172

the waiver could be reasonably foreseen. The focus of the CJEU is sub-sections (a) or (b) where the individual was aware of the trial and voluntarily and unambiguously waived his right to be present. From the Opinion it is evident that only two extremes are considered, at the one end the mandatory preclusion of any additional conditions and at the other “making the right to a retrial an absolute requirement irrespective of the conduct of the person concerned”.⁷⁴⁰ Sub-section (c) concerns where the individual is again aware of the decision but either expressly states that they do not contest it or does not request a re-trial. The main concern of compatibility with the right to a fair trial of Article 4a(1) lies in sub-section (d) which does not go far enough, being merely informed is not the same as having the opportunity; again we are faced with a theoretical versus a practical right. The shortcomings of (d) are not discussed in the judgment or opinion other than to highlight the differences between the old provision and the new. Specifically under Article 5 it “was for the executing judicial authority to assess whether those assurances were adequate”,⁷⁴¹ whereas under Article 4a(1), the discretion is removed and replaced with reliance on the information provided in the EAW. However, where the CJEU surpasses itself is in its interpretation of Article 53. The Spanish court envisages that Article 53 authorizes it to apply a higher standard of protection so as not to adversely affect its constitutional rights. The CJEU responds that such,

interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution.

Does EU primacy also trump HRs which go above the minimum standards set by the EU? Article 53, together with Article 52, calls for national authorities to remain free to apply higher standards of rights is now subject to the following “that the level of

⁷⁴⁰ *Melloni* (n122), Opinion of Advocate-General Bot §83

⁷⁴¹ *ibid*, Opinion of Advocate-General Bot §61

protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”.⁷⁴² Given that the freedom to set higher levels of protection flows from EU law, how does it then undermine EU primacy, unless EU law signifies ceiling standards rather than minimum standards. The Opinion goes on to say that MSs remain free to set higher standards where there is no EU nexus.⁷⁴³ This introduces yet another tier of HRs at the national level.

This judgment not only affects Spain but also other MSs including the UK who under section 21 EA provides that in circumstances covered by Article 4a(1)(a) and (b) the executing court must consider whether the surrender is compatible with the individual’s ECHR rights. If there is no entitlement to a retrial or a review which equates to a retrial then the individual cannot be surrendered. This provision is read in line with Article 6(3) ECHR requiring the individual to have a right to defend himself or by a legal representative (legally aided where necessary) and the ability to examine witnesses. This safeguard is absent from Article 4a(1)(d), lowering the right of an individual to have the merits reconsidered with the right to be informed of the opportunity and relegating to trust that the opportunity will be a real one.

It appears that where HRs standards are set out by the EU in a measure, this lowest common denominator as agreed by all states is the applicable right. Allowing states to go beyond this protection would cast “doubt on the uniformity of the standards of protection” undermining the principles of mutual trust and recognition and compromising the ‘efficacy’ of the framework decision.⁷⁴⁴

⁷⁴² *ibid* §60

⁷⁴³ *ibid* §§133-5

⁷⁴⁴ *ibid* §63

This restrictive reading of HRs within the EU is also a message to MSs, the European Parliament and Commission to aim high when setting down common defence rights. The Advocate-General explicitly states that “the definition at European Union level of a common, high degree of protection for the rights of the defence increases the confidence placed by the executing judicial authority in the quality of the procedure applicable in the issuing Member State.”⁷⁴⁵ This is unfortunately qualified with a statement that procedural guarantees should not be used to place an individual outside the reach of the law or in ‘the cross-border dimension’ of the AFSJ “to hinder the execution of legal decisions.”⁷⁴⁶

8.9 Right to Interpretation and Translation

Under Article 6(3)(e) ECHR, the right to interpretation is absolute, free and costs cannot be re-claimed from a defendant even if convicted⁷⁴⁷ irrespective of the financial situation of the accused.⁷⁴⁸ It is intrinsically linked to the ability to participate effectively.

Whilst the provision refers to “interpreter”, the right has been held to also include the right to translation of necessary documents but not necessarily all documents, in some instances oral assistance in understanding the documents may be enough.⁷⁴⁹ The assistance provided by the interpreter should be sufficient “to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.”⁷⁵⁰

⁷⁴⁵ *ibid* §116

⁷⁴⁶ *ibid*, Opinion of Advocate-General Bot §120

⁷⁴⁷ *Luedicke Belkacem and Koç v Germany*, s 6210/73, 6877/75, 7132/75, Judgment 10 March 1980; *Kamasinski v Austria*, 9783/82, Judgment 19.12.1989. It is unlikely that informal and unprofessional assistance is enough.

⁷⁴⁸ *Öztürk* (n578)

⁷⁴⁹ *Husain v Italy*, Application 18913/03, Decision 24.02.2005 and *Kamasinski v Austria*, 9783/82, Judgment 19.12.1989

⁷⁵⁰ *ibid* §74

The rights of the requested person as set out in Article 11 EAWFD include the right to assistance from an interpreter, although this is subject to the MR caveat – in accordance with national law. Measure A of the Stockholm Roadmap clarifies and extends both the scope and entitlements of this right under EU law. The right applies from the first police questioning and also includes a right to translation.

8.10 Appeal

There is no right to appeal and thus mode, scope and availability of appeals can be restricted. But where the judicial system provides for it, Article 6 guarantees apply. The extent of Article 6 applicability will depend on the features of the proceeding: powers, functions in law and practice, the manner interests of parties are presented and protected. In *Monnell and Morris*⁷⁵¹ the Court held that there was no need for applicant to be present since prosecution was not represented and it did not involve the re-examination of witnesses. In contrast, in *Granger*⁷⁵² the Court held a violation where a full appeal hearing was held where the applicant had no legal representative present but the prosecution was present.

In *Ekbatrin*,⁷⁵³ the ECtHR considered whether the absence of the applicant from the proceedings determining his appeal were contrary to Article 6. The ECtHR noted that the guarantee of equality of arms was met since neither the applicant nor was a representative of the prosecution were present, and that the Court of Appeal was restricted and could not impose a harsher sentence. However, the procedure did involve a full review to determine the applicant's guilt and the sentence imposed. The Court also had the power to reduce the fine or acquit and in undertaking its functions it

⁷⁵¹ *Monnell and Morris v UK*, s 9562/81, 9818/82, Judgment 2.03.1987

⁷⁵² *Granger v UK*, 11932/86, Judgment 28 March 1990

⁷⁵³ *Ekbatrin v Sweden*, 10563/83, Commission Report 7.10.1986

considered both points of law and fact. Since its judgment was not “based solely on objective conclusions” a violation of Article 6(1) was held.⁷⁵⁴

Whilst the issue of appeal has limited application to the EAW, appeal rights vary. For example the Netherlands only has one instance in EAW hearings before the Amsterdam Court with no further appeal. As illustrated by the ECtHR jurisprudence there is no right to appeal and so the Dutch process is in compliance with the ECtHR. On the other hand in the UK EAWs can be appealed all the way to the Supreme Court. Of relevance at this point is also notification of the decision to surrender. Article 19 EAWFD provides that the issuing authority is immediately notified of the decision. There is however no parallel obligation to notify the requested person. From the text of the EAWFD itself it is not clear how this affects the ability of the individual to challenge or appeal a decision which will be dealt with in accordance with the national law of the E-MS. These disparities create opportunities for distrust to creep in, however interference with their appeals system would not be welcomed by MSs and it would in any case be sufficiently dealt with by ensuring that the procedural guarantees are respected.

8.11 Is the Right to a Fair Hearing Relevant to the EAWFD?

According to the ECtHR, Article 6 is not applicable to EAW proceedings in the E-MS since these replace extradition between MSs and therefore are analogous. As set out above the reasoning by the ECtHR that extradition hearings are not a ‘determination of a criminal charge’ or a civil right is defective. In one line of cases no detailed considerations has accompanied these declarations and in the other unjustified comparisons are made to immigration cases. Beyond this, under the EAW system of MR the playing field has been altered, the integrated criminal justice system which permits the enforcement of ‘foreign’ orders without requiring any internalization has

⁷⁵⁴ *ibid* §69

changed what is to be regarded ‘as a whole’. The proceedings are no longer segregated, measures from one state flow into another without any additional checks or processes. The EAWFD proceedings in the E-MS are attached to the I-MS procedures. Thus whilst some HRs violations can be redressed at later stages of the proceedings, other violations should either be prevented or addressed in advance at the first opportunity. These violations are those which would result in what is termed a ‘flagrant denial of justice’. In order for this to be possible the national courts of the E-MS are required to be genuinely open to arguments on HRs points.

As is known, the phrase ‘flagrant denial’ originated from the *Soering* case and whilst the ECtHR has not provided a definition its case law is littered with examples of what will and will not equate to this high standard. When judging the decision of an E-MS the test applied is that crystallized in *Osman*; did the E-MS know or ought to have known when surrendering an individual of the risk of a flagrant denial of justice in the I-MS.⁷⁵⁵

Within the EU, the CFR permits the extended scope of Article 6 ECHR and in the next Part (which will consider the Stockholm Roadmap measures), it can be seen that the Commission has taken care to emphasise that the relevant procedural guarantees apply to the EAWFD, this reinforces the EU’s position that Article 6 ECHR is applicable to the EAW and MR measures more generally.

Before recapping what these procedural guarantees encompass, it is important to note that underlying these is ensuring the fairness of a trial. This includes the presumption of innocence and the related right to silence, both of which are reflected in the defence rights Directives adopted under the Stockholm Roadmap. In addition the case law on the presumption of innocence provides a useful line of argument which states that

⁷⁵⁵ *Mamatkulov* (n565) §90

extradition is connected to and concomitant to criminal proceedings and for this reason Article 6(2) applies to extradition proceedings. It follows that given the changing nature of extradition in the EU, the integrated system and the transnational nature of criminals and their crimes, all the proceedings are to be considered as one with Article 6 applying at all stages. Another aspect of fairness is reasonable time; this relates to the time taken to surrender an individual, the time taken to conclude the trial as well as the time taken to bring proceedings.

What has been discovered is that on the one hand, at the EU level the scope of Article 6 ECHR guarantees have been extended to cover EAW proceedings in the E-MS. On the other hand the EU seems to have relegated the significance of the obligation not to surrender when the individual faces a real risk of a ‘flagrant denial’ of justice in preference to mutual trust and the promotion of MR and judicial cooperation.

The defence rights are largely set out in the Stockholm Roadmap and include the right to be informed in a language the accused understand, adequate time to prepare their defence and the right to legal representation and legal aid. The need for these additional Directives on defence rights (beyond the ECHR) is to translate the theoretical rights into a practical reality in all MS national laws.

It will be interesting to see if the ECtHR’s position of allowing mutual trust to be prioritized will be maintained or if it will change as the EU adopts measures which extend the application of procedural guarantees to EAW proceedings and other MR measures.

Chapter Nine: Human Rights Conclusions

The practical impact of the EAWFD on HRs is best seen through consideration of three cases which draw together the various HRs matters that have been raised in the preceding chapters. What is clear is that such heavy reliance on MR was premature.

9.1.1 Stapelton

The first case is a good illustration of the tension that exists at national level between a judge's natural instinct to protect HRs and their duty to abide by the principle of MR. Ultimately it is disappointing that the ECtHR failed to take the opportunity presented to it to reinforce and remind EU MS of their continuing obligations under the ECHR, in spite of the vows of MR that MSs have taken.

The case of *Stapelton*, considers the application of the obligation of a state not to surrender an individual where there is a real risk that they would face a flagrant denial of justice. Mr Stapelton had lived in the UK until 1985 when he moved to Spain, then France and then Ireland in 1994. In March 2004 a UK Magistrate Court issued an arrest warrant for him and a year later the UK issued an EAW for 30 counts of fraud allegedly committed between 1978-82. In September 2005 he was arrested by the Irish police pursuant to the UK EAW.

One of the points of issue between the Irish courts themselves was not only who was better placed to consider the HRs complaint but also whether the HRs issue should be considered at the first occasion it was raised (namely before the Irish Courts during the EAW proceedings) or if it should be left to the courts of the I-MS or failing that the ECtHR.

Judge Peart of the Irish High Court was of the opinion that the notion that a high level of confidence existed created a presumption that the other MSs will act in accordance with expectations that they respect the rule of law and HRs. However, that it was also not disproportionate to give the wanted person an opportunity to show that the presumption was unwarranted under the circumstances. Peart J states that whilst admittance of evidence is a decision for the trial judge in the I-MS and that the right to due process was available in the UK, Section 37 of the Irish implementing laws still meant that no surrender should occur if it would breach either the ECHR or the Irish Constitution. In his opinion, it was not appropriate to expose individual to a “hazard that his rights might not be vindicated there in the same manner in which they would in my view in this jurisdiction”. This was not an indication of a lacking in the aspirational high confidence on the part of the judiciary, although this aspiration was not regarded a sufficient safeguard by the legislature, leading to the inclusion of section 37, where Ireland was not alone in including such provisions in their implementing laws.

Peart J maintains that the simplification of the ‘extradition’ process was not an intention to diminish individual rights. It was not contemplated that there would be less protection on offer. He proceeded to refuse surrender of Mr Stapelton asserting that 27 years go “way beyond any time by which a fair trial within a reasonable time can take place in respect of these offences.” His decision was overturned by the Supreme Court who fulfilled the EAW request for surrender of Mr Stapelton to the UK. The Supreme Court in allowing the appeal relied on *Pupino* to interpret as far as possible section 37 in line with the EAWFD. It also relied on the principle of MR and the assumption of respect for HRs.

The ECtHR took the same position as the Supreme Court stating that the UK has a “common law jurisdiction to stay proceedings for alleged unfairness caused by delay on

the grounds of abuse of process”,⁷⁵⁶ that Mr Stapleton could make this challenge at the first opportunity and if unsuccessful he was able to apply to the ECtHR itself. The ECtHR concludes that in the present case that there were no substantial grounds disclosing a real risk. Importantly it notes that the UK is a contracting party signing up to “abide by its Convention obligations” which it has incorporated into domestic law via the Human Rights Act 1998. It also regards consideration of the 28 years delay in initiating the trial as a complex issue and that the UK (the I-MS) was best placed to assess fairness associated with this delay.

A question not considered by the ECtHR or the Supreme Court was whether the UK authorities had given consideration to the delay before proceeding in issuing the arrest warrant and what their reasoning was for continuing to issue the EAW despite the Irish High Court determining that the delay went way above the threshold required for a breach.

A schism can be seen between the ECtHR’s longstanding jurisprudence requiring national authorities to act as the first port of call for HRs protection and their approach taken with the EAW. Whilst approving of the currently foundationless mutual trust in MS legal systems, it also displaces the traditional obligations from the MS whose jurisdiction the person is located, to the responsibility of the I-MS and ultimately putting itself at the bottom of the cliff as a safety net.

9.1.2 Assange

The high profile case of Julian Assange raises valid criticisms of the operation of the EAWFD. The way in which the complaints of Mr Assange are set out in the City of Westminster District Court judgment⁷⁵⁷ makes them appear like sensationalised tabloid accusations. For example, one reads that the Swedish prosecutor is “biased against

⁷⁵⁶ *Stapleton v Ireland*, 56588/07, Decision 4.05.2010 at §30

⁷⁵⁷ Judgment 24.02.2011

men...that she has lost her balance...[and] is in favour of locking up innocent men”.

Another complaint quotes the Swedish lawyer as calling Mr Assange a coward for not returning. Assange’s skeleton argument is however more logical and amongst the complaints there are some good legal points which highlight the inefficiencies and dangers of the EAWFD.⁷⁵⁸ In particular these include the disproportionate use of the EAW; the blurring between investigation and prosecution; the potential to use the EAW for political reasons; the issues with mutual trust and the presumption.

Having been satisfied that the offences are extradition offences and that none of the section 11 bars are raised or found, Riddle DJ goes on to consider the allegations of abuse of process and extraneous considerations (namely HRs). The crux of Riddle DJ’s judgment as to why surrender should proceed can be summarised as follows. First, mutual respect and confidence underpins the EAW system and for this reason when ambiguities arise, the first port of call for clarification will be the judicial authority of the I-MS. There is “a strong presumption” in favour of having confidence in the I-MS, however Riddle DJ accepts that it “can be rebutted by other evidence”. Second, the disproportionate use of the EAW is “not a free-standing bar to extradition”. Finally, Riddle DJ is of the opinion that any irregularities which may have occurred in Sweden are best rectified during the trial in Sweden. Related to this point, he notes that whilst there are allegations that Assange would not receive a public hearing and therefore a fair trial, he was not referred to “any significant body of European court cases” other than the case of *Fejde v Sweden*.⁷⁵⁹ In fact there are over 100 cases against Sweden in which the ECtHR found a violation of Article 6 in relation to the lack of a public hearing.

⁷⁵⁸ The original skeleton argument can be found at: <http://www.fsilaw.com/news-media/news/28-julian-assange-case-papers/>. One reason to explain the marked difference in the judicial interpretation of the complaints could be the witness questioning during the hearing.

⁷⁵⁹ 12631/87, judgment 29.10.1991

On appeal to the High Court *Assange* made four submissions.⁷⁶⁰ First on double criminality and the fact that the first 3 allegations of sexual molestation by the two women, which are not EAWFD offences, do not satisfy the dual criminality test and that the fourth would not equate to rape under the law of England and Wales had it been fairly and accurately described. Thomas LJ first ascertained that it is only in exceptional circumstances appropriate for a court to have regard to extraneous material in order to determine the accuracy of the description of the conduct,⁷⁶¹ the purpose of which was solely to ensure the fairness and accuracy of the described facts and not an enquiry into the decision to prosecute a certain offence. No exceptional circumstances were found to exist in *Assange*'s case. Nevertheless having had the material placed before them the court did express their view as to whether it would have made any difference had they taken it into account. For offences 1-3 Thomas LJ held that the descriptions were fair and accurate and that dual criminality was made out. For Offence 4 the Court held that the description was fair and accurate but that in any case, it is the law of the I-MS which governs the classification of rape. Under the EAWFD for 32 offences dual criminality is abolished (including for rape) and as such an enquiry like this is not ordinarily part of the EAW process. The only question is whether the offence is classified as rape in the I-MS. This is not to say that a real issue does not exist and in fact the *Assange* case reignites a criticism of the EAW and MR, the potential abuse that is created with the abolition of dual criminality without any agreed definition of the 32 offences. For non-EAWFD offences the UK requires dual criminality to exist although it will presume that the facts and offence are as set out in the EAW, unless evidence is adduced to the contrary.

⁷⁶⁰ *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), §41

⁷⁶¹ The Court followed *The Criminal Court at the National Court, 1st Division (a Spanish Judicial Authority) v Murua* [2010] EWHC 2609 (Admin). Exceptional circumstances would arise where there has been a fundamental error, unfairness or bad faith by the issuing Member State authorities.

This is related to the second submission, namely that the details set out in the EAW were not specific enough as required by the EAWFD to ensure that the case is not subsequently broadened thereby not enabling the specialty rule to be asserted. The key HRs concern related to the possibility of onward extradition to the US. The EAWFD provides a thin layer of protection against such action – in the form of a watered down specialty rule.

Third on the issuance of an EAW before the commencement of a criminal prosecution, under the EA there is the additional safeguard of requiring the wanted person to be an ‘accused’ person.⁷⁶² Related to this is also the alleged disproportionate use of the EAW when the Swedish prosecutors could more appropriately engage with the mutual legal assistance mechanism. It was argued that there was no ‘charge’ in Sweden; in other words Assange was not wanted for prosecution but for investigation. This could be a potential conflict between accusatorial and inquisitorial systems. At what point does ‘investigation’ in inquisitorial systems cross the line into a prosecution? Ultimately it is a question to be determined by the I-MS whose decision the E-MS is to trust unless strong evidence is presented to the contrary. That said, instances where there is a strong suspicion of such misuse, authorities opt for more diplomatic routes to refuse surrender. The preferred method is to request further information from the I-MS.⁷⁶³

Finally, a public prosecutor cannot be a judicial authority because they are not an independent body as envisaged under the EA. Reliance was placed on the *Cando Arms* case which stated that a deliberate deviation from the EAWFD was to ensure that an individual is protected “against an unlawful infringement of the right to liberty”.⁷⁶⁴ Delivering the judgment, Thomas LJ stated that the EAWFD leaves it for individual MSs to designate which authority is competent to issue an EAW. “It is therefore

⁷⁶² *Re Ismail (Application for Writ of Habeas Corpus)* [1998] UKHL 32

⁷⁶³ This was confirmed by a number of judges at meetings held under Chatham House rules.

⁷⁶⁴ *Officer of the King’s Prosecutor Brussels v Cando Arms*, [2006] 2 AC 1 §24

entirely consistent with the principles of mutual recognition and mutual confidence to recognise as valid an EAW issued by a prosecuting authority designated under Article 6.”⁷⁶⁵ Nevertheless he also recognises the importance of maintaining public confidence and mutual confidence of citizens with judges of the MSs. It for this reason that Thomas LJ accepts the need for “more intense scrutiny...where a warrant is issued by a “judicial authority” who is not a judge.”⁷⁶⁶ In the case of *Assange*, even though the EAW was issued by a prosecutor, Swedish courts had scrutinised the decision and this was sufficient to trust due process had been followed. This again was an assertion that had already been dealt with by the courts of other MSs (i.e. Cyprus).⁷⁶⁷ The EAWFD is also clear on this point, it is up to each MS to designate their own ‘judicial authority’. Whilst MSs are expected to work together some of their decisions are ring-fenced from assessment by other MSs and in particular the E-MS. The UK provides for additional protection where the EAW is not issued by a judicial authority and has not been subjected to consideration by an independent authority. In these circumstances the UK judges are permitted to consider the decision to issue an EAW.

Before the High Court, determination of the submissions was largely predetermined by the EAWFD itself, not leaving much (if any) scope for the UK courts. The courts did raise valid criticism of the EAWFD; however with the current allegiance to the principle of MR, they were issues which could not be corrected by the judiciary, but only by Parliament.

By the time the case reached the Supreme Court⁷⁶⁸ the only issue left to be determined was the meaning of ‘judicial authority’ in the EAWFD and the EA. The majority accepted that a prosecutor fell within the meaning of a ‘judicial authority’. In reaching

⁷⁶⁵ *Assange* (n760) §41

⁷⁶⁶ *ibid* §19

⁷⁶⁷ *Assange* (n760) §44 citing Christou, *A Case Study of the EAW* (n767)

⁷⁶⁸ *Assange v The Swedish Prosecution Authority* [2012] UKSC 22

this conclusion the court took into account the wider meaning of the French text and the fact that the designation of prosecutors for the role in 11 MSs had not attracted any criticism from the Commission. The inclusion of a definition in the original draft of the EAWFD (which included prosecutors) and the subsequent removal of the definition in favour of the competent authority according to the law of each MS was discussed before the Court. The preferred interpretation of Lord Phillips was that the final version broadened the scope of a ‘judicial authority’, allowing MSs to designate whichever authority they saw fit. Lord Dyson and Lord Mance (in the absence of evidence) both disagreed with this view. Lord Mance stated that the final text of Article 6(1) EAWFD in all probability reflected the inability of MSs to agree upon the definition. However he went on to say that it was not for the Supreme Court to determine this but instead to “focus on the final Framework Decision and seek to make sense of its text in the light of its purpose, the principles underlying it and general principles of European law”. The suitability of designated authorities was a question to be determined by the CJEU; however the hands of the UK judges remain tied with their inability to refer preliminary questions on these matters.⁷⁶⁹ Lord Kerr stated that given the traditional role of the prosecutor to issue extradition warrants, had the intention being to exclude them from the process it would have been explicitly stated in the EAWFD. Is the acceptance that a prosecutor can decide on the issuance of an EAW a move away from what was envisaged by the EAWFD, in particular the reliance on judges to be the guardian of rights? Or is it recognition of the blurred line that exists between prosecutors and judges in civil law countries? What about the need to ensure that the decision was made after impartial and independent scrutiny?

⁷⁶⁹ For an outline of the restricted jurisdiction of the CJEU in relation to the UK see footnote 381. This restricted scope means that UK judges are unable to make preliminary references to the CJEU on matters concerning the AFSJ; although interestingly the UK government is not prevented from intervening in cases from other Member States before the CJEU on these same matters.

The *Assange* decision has wider implications on the interpretation of EU law. In his dissenting opinion Lord Mance overturns *Dabas* and the revised view (which all judges agreed with) is that *Pupino* does not apply to the EAWFD. Lord Mance found that measures adopted under the third pillar fall outside section 2.⁷⁷⁰ Nevertheless, the UK courts were obliged under common law to fulfil their EU obligations.

9.1.3 Campbell

In the third case, Liam Campbell was arrested in Ireland pursuant to an EAW issued by Lithuania. In breach of bail he skipped over to Northern Ireland where he was soon arrested again on the basis of the EAW. Once the Divisional Court in Northern Ireland asserted that it had jurisdiction to consider the case, Lithuania withdrew the application in Ireland. The crux of Mr Campbell's argument was that on surrender to Lithuania he would be subjected to inhuman and degrading treatment by virtue of the prison conditions. The High Court judgment,⁷⁷¹ which includes an account of the process followed by Burgess J, is a neat example of how the HRs ground for refusal could and should operate.

The 'high hurdle' that had to be overcome to establish that there was a risk of a flagrant denial of Article 6, was not satisfied. However Burgess J held that the surrender would violate Article 3 and be in breach of section 21 EA. In reaching this conclusion the judge applied the *Soering* test, "posing for himself the question whether there were substantial grounds for believing that the requested person, if extradited to the requesting state (Lithuania), would be faced by a real risk of exposure to inhuman and degrading treatment or punishment proscribed by Article 3."⁷⁷² He acknowledged that the test involved an assessment of the conditions and placed liability on the E-MS because the 'exposure' of the individual to such treatment was a 'direct consequence' of

⁷⁷⁰ *ibid*, per Lord Mance, §§198-217

⁷⁷¹ *Lithuania v Liam Campbell* [2013] NIQB 19

⁷⁷² *ibid* §7

its actions. Extensive evidence was considered including CPT reports, testimony of an expert with an impressive CV and firsthand experience of Lithuanian prisons including the relevant prison (Lukiskes Prison) and the ECtHR judgment⁷⁷³ which found a breach of Article 3 against Lithuania in respect of prison conditions. The High Court follows a similar reasoning.

The key element of the case is the evidence adduced. The expert was independent and reputable and the testimony was up to date and specific to the conditions (and prison) the individual would face. This was supported by CPT reports and ECtHR judgment. The case signifies the winds of change where prosecutors are having a harder time convincing courts by relying on well versed arguments relating to the importance of fulfilling extradition obligations and the near absolute presumption of trust. Defence counsel on the other hand have gradually, through case law, obtained a clear indication of what the courts require for the presumption to be rebutted. On this occasion they fulfilled the requirements with case specific evidence.

The disingenuous reliance on *K.R.S. v UK* and other distinguishable cases are dealt with head on by the court which also included Mitting J's approach to the presumption. In a way this case confirms that the relativist approach to the nature of Article 3 treatment is of limited applicability. It is applicable in cases concerning the use of strip searches or slopping out, aspects which on their own may be justified in the circumstance, even though in other instances they would equate to a violation of Article 3. However prison conditions such as overcrowding or a culmination of issues found to fall short of the permitted treatment are universal in their violation, irrespective of factors such as the desirability of extradition.

⁷⁷³ *Savenkovas v Lithuania*, 871/02, Judgment 18.11.2008

9.2 Rule 39 Interim Measure

The three cases also reflect the warped application of the ECtHR mechanism and what appears to be the part suspension of Rule 39 to EAW proceedings. It is not only within the national judicial protection that HRs may not be adequately accommodated. There is “a weakness in the ECtHR’s regulation of the formal procedure of extradition”.⁷⁷⁴

Having characterised extradition proceedings as administrative, the protection of the individual’s rights is exclusively concentrated on their “potential future treatment” through the determination of a real risk.⁷⁷⁵ The serious impact on the individual is currently not balanced sufficiently by coverage of ECHR standards. Langford believes that this weak regulation by the ECtHR of extradition is substituted by the applicability of interim measures.⁷⁷⁶ This is an interesting thesis. The granting of a Rule 39 interim measure, compels the MSs to act and ensure that the individual will be protected upon surrender. It is normally a precursor to the finding of a violation and in a way can be regarded as an opportunity for the MS to act at their domestic level in order to avoid the finding of a violation against them.⁷⁷⁷ In its consideration of Article 34, in *Soering*, the Court went on to hold, where it is plausibly asserted that there is a risk of “irreparable damage to the enjoyment...of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court’s determination of the justification for the measure.”⁷⁷⁸ The interim measure goes to the substance of the Convention complaint and the applicant’s desire to preserve the right before irreparable damage is done.

Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the “effective exercise” of the right of individual petition under

⁷⁷⁴ Langford (n566)

⁷⁷⁵ *ibid*, 551

⁷⁷⁶ *ibid*, 552

⁷⁷⁷ The Rule 39 procedure is designed to ensure that, once the ECtHR has been seized of a complaint no irreparable damage occurs which would render worthless the subsequent finding of a violation.

⁷⁷⁸ *Soering* (n177) §108

Article 34 ECHR in the sense of preserving the subject matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State.⁷⁷⁹

Whilst Rule 39 of the Rules of the Court falls within the procedural framework of the ECHR (as opposed to the substantive rights), the threshold applied by the ECtHR is lower than that applied for substantive rights. A threefold test requires to be satisfied by those seeking a Rule 39. It must be shown to the ECtHR that: (1) there is a threat of irreparable harm of a very serious nature; (2) the harm is imminent and irremediable; and (3) there must be an arguable (*prima facie*) case. A prime example which would satisfy the test is where an individual is threatened with removal to a situation where their life or physical safety would be at risk contrary to Article 2 or 3.

The guidance on making a Rule 39 application⁷⁸⁰ together with the general practice⁷⁸¹ suggests that that applications are to be supported by sound independent evidence (and not just the applicant's assertions) of the grave harm which the individual will be subjected to if deported. The evidence supplied must be sufficient to convince the ECtHR that serious irreparable damage will occur if they do not intervene. Such evidence has included in the past background reports about the HRs situation in the country of destination such as those from UNHCR, Amnesty International, Human Rights Watch and other NGOs, and although these may strengthen an application, they will not be sufficient in the absence of solid evidence to link the applicant with a threat of immediate danger. This can be shown by domestic decisions (including letters) and evidence of past (and indications of future) ill-treatment against the applicant. As previously stated, it is important to remember that almost always a personal danger to

⁷⁷⁹ *ibid* §108

⁷⁸⁰ The Practice Direction of the Court, available at: <www.echr.coe.int/NR/rdonlyres/5F40172B-450F-4107-9514-69D6CBDECF5C/0/PracticeDirectionsInternimMeasuresMarch2005.pdf>

⁷⁸¹ The author has professional experience in assisting and advising on making of applications for Rule 39.

the individual concerned must be shown. Although following *Salah Sheekh*⁷⁸² it may be sufficient to show that others in the applicant's situation/particular group have been subjected to Article 3 prohibited treatment. It will always be a stronger case if it can be shown that the applicant himself has and/or will face such treatment.

It is arguable that a similar threshold should be applied by domestic courts in order for them to be moved to scrutinise the situation in the I-MS, as opposed to simply passing the buck to the I-MS and then to the ECtHR or to require the individual to carry the full burden of proving a real risk exists.

It is interesting to note that despite holding this power, the ECtHR has only recently agreed for the first time to issue a Rule 39 interim measure in cases concerning EAWs.⁷⁸³ The reasoning for previous refusals to grant Rule 39s was not entirely sound and is based on the fact that an individual, when being surrendered to a Council of Europe MS, maintains the right to individual petition and their complaint can continue to be considered by the ECtHR. However its own jurisprudence highlights that the importance of a Rule 39 is to avoid irreparable damage such as treatment contrary to Articles 2 and 3 ECHR. It is therefore irrelevant whether a person's individual petition is effected or not by the surrender. Rather the question the ECtHR should consider is whether the individual will suffer irreparable harm.⁷⁸⁴

As in any other area, in criminal matters and in MR measures the importance of HRs cannot be underestimated. At first glance it may appear that the principle of MR displaces HRs in an almost absolute manner. At closer inspection it is evident that HRs are a vital partner and a crucial support system for MR in criminal matters. As set out above, the principle of MR relies on mutual trust between MSs. The fact that MSs have

⁷⁸² (n227)

⁷⁸³ For example in *E.B.* (n554)

⁷⁸⁴ Disregard for the interim measure granted under Rule 39, can have serious consequences. In *Soering* it prevented the ECtHR "from obtaining additional information to assist it in its assessment of whether there was a real risk of a flagrant denial of justice". *Soering* (n177) §91

refused to surrender individuals illustrates that neither are absolute, but rather that the principle is a rebuttable judicial presumption. Evidence of a real risk of a HRs violation is one instance of when the presumption will be rebutted. However, even where surrender is not refused, the issues and criticisms raised by judges shows a level of judicial frustration coupled with genuine concerns which require the attention of the national and regional legislators.

Part III: EU Defence Rights and the EAW

In Part 1 explored the issues raised by both the use of MR in criminal matters and the implementation of the EAWFD. Part 2 reviewed the HRs relevant to the application of the EAW, setting out the applicable minimum standards, the shortcomings of the ECtHR and EU law, the impact of the EAWFD and the gaps accentuated by its use. Both parts highlighted the discrepancies which exist between the implementation of the EAWFD and of HRs, particularly in relation to the grounds for refusal and the implied notion of HRs. As shown, implementation of ECHR standards differs between MSs and fundamentally between protection in theory and in practice. The focus of Part 3 will be on the steps taken by the EU to protect and reinforce defence rights at the EU level. It is anticipated that entry into force of the Lisbon Treaty, together with the renewed will shown under the Stockholm Presidency⁷⁸⁵ will help avoid past failings in attempts to adopt minimum procedural guarantees.

Chapter Ten: The Lisbon Effect

With the entry into force of the Lisbon Treaty⁷⁸⁶ in December 2009, the constitutional arrangements of the EU changed,⁷⁸⁷ of particular relevance to the AFSJ being the elimination of the 3rd pillar – the intergovernmental domain. The first and third pillars

⁷⁸⁵ 1 July–31.12.2009

⁷⁸⁶ Lisbon Treaty (n173)

⁷⁸⁷ It is beyond the scope of this thesis to consider in great detail the Lisbon Treaty. What follows is meant as only a brief introduction to its aspects which effect European criminal justice and human rights. The Treaty on the Functioning of the Union (TFEU) covers provisions on the EU policies and areas of action. The Treaty on European Union (TEU) sets out the constitutional provisions and specific provisions on foreign policy. Article 1 TEU states that both Treaties have the equal legal value with no hierarchy, superiority or priority between them. The CFR is also given the same legal value as the TEU and TFEU. The EU remains a single legal personality and the European Community is abolished. The pillar structure is abolished and one 'Union' is created (although special procedures in foreign policy, security and defence remain). As part of the reforms, Framework Decisions in the AFSJ are abolished and replaced with Directives enacted under the ordinary legislative procedure. As already set out above the jurisdiction of the CJEU is extended to include AFSJ in the same way as other areas and there are under Article 10 of the Protocol on Transitional Provisions, transitional arrangements the most relevant of which have already been discussed above with reference to the UK. For further analysis see: House of Lords EU Committee, *The Treaty of Lisbon: An Impact Assessment*, Volume 1, 10th Report, Session 2007-08 HL Paper 62-1; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, OUP, 2010

have been merged and all AFSJ legislation is now made under Title V of Part 3 of the Treaty on the Functioning of the European Union (TFEU), with judicial cooperation in criminal matters is found under Chapter 4.

Pre-Lisbon the AFSJ (including criminal justice) sat under the 3rd pillar of the EU, where the adoption of policy and measures was distinct in terms of their mode⁷⁸⁸ requiring adoption by unanimity of the Council. A democratic deficit existed due to both the lack of parliamentary scrutiny and judicial accountability. Under Lisbon, the 3rd pillar and its mechanisms disappear and are replaced with the ordinary EU legislative process of qualified majority voting in the Council and instead of only a consultative role for the European Parliament they have co-decision. The right of legislative initiative continues to be held by the Commission but no longer by single MSs; a MS legislative proposal needs to be made by a group consisting of at least ¼ MSs. Together with the introduction of preliminary review of legislative proposals by MS national parliament, the changes intend to ensure that time is not lost working on measures which are not supported by MSs and make the legislative process more democratic. Under Lisbon, competence to legislate on criminal matters is treatisized. Article 82 relates to criminal procedure including the adoption of minimum rules such as the rights of individuals. Article 83 relates to substantive criminal law such as the adoption of minimum rules defining serious crimes with a cross-border dimension and related sanctions.

The principle of MR is enshrined in Articles 67(4) and 82(1) TFEU; of relevance to the principle of MR in the criminal sphere, is also Article 31 which provides for the ability to undertake common action to ensure the compatibility of rules applicable to MSs where necessary to improve judicial cooperation in criminal matters. Such measures include those aimed at increasing the level of mutual trust. Finally Lisbon elevates the

⁷⁸⁸ Special instruments such as Framework Decisions.

status of the CFR which is now both binding and judiciable *vis a vis* EU law. It is clear that the changes will make it easier to legislate in the area and less likely to be held hostage by a handful of dissenting MSs. There is one caveat on this positive note, under Lisbon the basis of power to legislate on HRs is for the promotion of MR and therefore such legislation runs the risk of being framed for the interests of MSs.

Chapter Eleven: Approximation of Procedural Guarantees

MR is based on the presumption that the criminal justice systems of all EU MSs respect HRs and the rule of law. This should not however excuse the one-sided nature of measures adopted on criminal matters at the EU level. Until recently the measures adopted in this sphere have been advantageous to the security interests of MSs. A prime example is of course the EAWFD which has statistically increased the efficiency of cross-border transfers for police forces and prosecutors across Europe. In evidence given to the Parliamentary Joint Committee on Human Rights both Commander Gibson, representing the Association of Chief of Police Officers (ACPO) and the Director of Public Prosecutions, Keir Starmer QC, agreed that the EAWFD had made the process easier, simpler and quicker than the previous system.⁷⁸⁹

However when speaking of its successes, the elephant in the room was for a long time the absence of any matching proficiency in the protection of HRs beyond the presumption of mutual trust. Critics believe that at the very least harmonisation of minimum standards of procedural guarantees should have been part and parcel of the EAWFD; reflected in a sister Framework Decision on procedural safeguards in criminal proceedings. This was tabled on 28 April 2004⁷⁹⁰ and whilst it was considered at the time by some as too little too late, political agreement was not reached and the proposal was withdrawn in June 2007. It is nevertheless worth considering the Commission's reasoning for why such a measure was needed and what it regarded as necessary to address, since as we shall see both the Commission reasoning and the proposed contents formed the basis for the Stockholm measures which will be considered below.

⁷⁸⁹ Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, 22.06.2011

⁷⁹⁰ 9318/04 COPEN 61 + ADD 1

The first step is to rewind and understand the role of HRs in the EU. Before 1996, it is not clear that the EU had jurisdiction over HRs, the Rome Treaty made no reference to HRs. Over the years, the ECJ had taken a number of opportunities⁷⁹¹ to proclaim the important relationship and relevance of HRs to Community legislation and as part of the EU general principles. However it was not until the Maastricht Treaty that HRs compliance was treatisized.⁷⁹² In 1997, the Amsterdam Treaty saw HRs further elevated with Article 6 expressly stating that HRs would be respected and Article 7 setting out the sanctions for serious breaches.⁷⁹³

11.1 The Need

In 1998 the Commission, in setting out its vision for an AFSJ,⁷⁹⁴ stated that a “minimum standard of protection for individual rights was the necessary counterbalance to judicial cooperation measures that enhanced the powers of prosecutors, courts and investigating officers.”⁷⁹⁵ In 2000 signing of the CFR further entrenched the position and role of HRs within the EU and contained many provisions relevant in criminal matters. In 2001, the Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters,⁷⁹⁶ stated that “mutual recognition is very much dependent on a number of parameters which determine its effectiveness”. These include “mechanisms for safeguarding the rights of third parties, victims and suspects...the definition of minimum common standards necessary to facilitate application of the principle of mutual recognition”.

On 19 February 2003, the Commission issued the next step in the consultation process to achieve minimum common standards of procedural safeguards, its Green Paper on

⁷⁹¹ See *Stauder* (n411); Case C-49/88 *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co v Council* [1991] ECR I-03187; Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 02859.

⁷⁹² Treaty of the European Union 1992, Article K2 of Title VI.

⁷⁹³ These were further amended in 2003 by the Nice Treaty.

⁷⁹⁴ Commission, *Towards an Area of Freedom, Security and Justice*, COM(1998) 459 final, 07.1998

⁷⁹⁵ Commission, *Green Paper from the Commission*, COM(2003) 75 final p.8

⁷⁹⁶ EU, *Council Programme*, Official Journal C 012, 15/01/2001 P. 0010 – 0022

Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU.⁷⁹⁷ The Commission considered that membership of the ECHR by all MSs, meant the mechanism was already in place, it was simply a matter of reconfirming the standard of procedural safeguards in a single document. The minimum standards set by the ECtHR are applicable to all MSs of the Council of Europe, some of which are years behind in terms of the development of their legal systems when compared to the EU MSs. These minimum standards are therefore not enough to instill trust within the EU in each other's systems. Additionally, whilst the ECtHR minimum standards are often satisfactorily "translated" into national procedures, it is the "divergent practices [which] run the risk of hindering mutual trust and confidence which is the basis of mutual recognition".⁷⁹⁸ The Commission viewed the confirmation of the rights as "desirable" so as to make their operation in practice more visible and to ensure equivalence. Equivalence as we have seen above was a key element which secured the success of MR in the internal market and which is missing from criminal matters. The Green Paper sought not to replace the ECHR's role, but rather to ensure consistent and uniform application of the rights across the EU. For this reason the Commission considered that regular and continuous assessments of compliance were equally important and that the ECtHR could not be relied on to act as a safety net, but rather MSs needed to develop a means to remedy breaches on their own motion;⁷⁹⁹ evaluation and monitoring "is an essential component in order to achieve common minimum standards and to promote trust"⁸⁰⁰ the intention being to "promote compliance at a consistent standard".⁸⁰¹ It is important for the level of compliance to be "demonstrably high" so that MSs can have confidence in the compliance by other MSs. Genuine mutual trust needs to be

⁷⁹⁷ Green Paper (n795)

⁷⁹⁸ *ibid*, 9

⁷⁹⁹ *ibid*, 39

⁸⁰⁰ Commission, Commission Staff Working Paper, *Proposal for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union, Extended Impact Assessment*, COM(2004)328 final SEC(2004) 491, 28.4.2004, 4

⁸⁰¹ *ibid*, 3

established not only in the perceptions of governments but also “the minds of representatives of the media, practitioners, law enforcement officers and all those that will administer decisions based on mutual recognition on a daily basis.”⁸⁰²

Approximation of HRs is also an attempt to form a uniform understanding of applicable rights and where appropriate the creation of autonomous meanings within the EU.

Whilst attempts in other areas of the EU can be charted further back (in the context of the CJEU’s role in protecting HRs), the 2004 proposals can be said to mark the start of endeavours in the criminal law sphere.

When determining the HRs to be addressed, the whole picture needs to be kept in mind. At one corner of the frame is the image of a foreign national snatched into an alien system whose procedures are conducted in a language foreign to him and who is kept in pre-trial detention for an extended period, denied bail because of his lack of connections to the MS as a non-national (or non-resident). At the other corner is an individual tried in his home country but with violations of his rights ranging from a trial in absentia to a trial with insufficient legal assistance or someone wanted by their home country to either stand trial or serve a sentence in circumstances which would violate their rights. These individuals and all those in between, have varying needs and differing rights which need to be addressed.

11.2 The 2004 Proposal

The Green Paper was itself preceded by a review of procedural safeguards carried out by the Commission by way of a broad Consultation Paper open to all interested parties and a questionnaire sent to the MSs. Both of these formed the basis of identifying the five areas to be immediately addressed. These were listed as: access to legal representation; access to interpretation and translation; a “Letter of Rights”; ensuring

⁸⁰² *ibid*, 21

proper protection of vulnerable suspects and the provision of consular assistance. It was decided that bail and detention conditions were to be considered together and set out in a separate measure.

In summary, access to interpretation and translation were regarded as important since being able to understand the proceedings against you are vital to ensuring that they are fair. The cross-border nexus increases the likelihood that the individual concerned will not be in their country of origin and therefore may not be competent in the official language of the proceedings. The provision of a “letter of rights” is noted as important since rights are meaningless if individuals do not know what their rights are. Provision of consular assistance is related to the above rights. It is the ability to speak to an individual who speaks your language, who can explain your rights, assist you and above all someone who shares similar values.

The 2004 Proposal set out the minimum standards in relation to each of the above listed rights. The starting point for all was the ECHR and the jurisprudence of the ECtHR, with the Commission occasionally filling in any gaps with the assistance of the CFR, the jurisprudence of the CJEU and findings from its own consultation and research.

11.3 The Objections

Given the basis of the provisions, it was not their content which MSs objected to.

Despite the UK originally backing the proposed Framework Decision, at the end of its Presidency, in December 2005, their position changed. According to Professor Spencer, although the change of heart was never officially announced, he believes a key reason was a change in the UK civil servant negotiating in Brussels and government policy wanting to appear hard on crime and standing up against Brussels wanting to give even

more rights to criminals.⁸⁰³ In their endeavours to block the measure, the UK was joined by the Republic of Cyprus, Czech Republic, Republic of Ireland and Slovakia. Reasons for the objections ranged from the EU's lack of competency to the unnecessary doubling up on the existing ECHR obligations.

The Commission had chosen Article 31(1)(c) EU as the legal basis, however the MSs listed above refused to accept this since the proposal would also apply in internal cases with no cross-border nexus or judicial cooperation. The proposed legal basis (Article 31) allowed common action on judicial cooperation in criminal matters to be taken in order to ensure the compatibility of rules in MSs as necessary to improve judicial cooperation in the field. The Commission further added that it was a necessary complement to the MR measures adopted to aid the prosecution.

Their view was that no competence had been conferred or no Treaty basis existed for the EU to interfere with the integrity of their domestic criminal justice systems by legislating on defence rights or criminal procedure.⁸⁰⁴ At the time the UK and others expressed their willingness to support a measure whose application was limited to cross-border cases. However such a restrictive measure would not sufficiently promote mutual trust or confidence in MSs' systems. Individual will be subjected to the criminal justice systems of states as a whole and not only the cross-border measures.

The central constitutional objection was that there was no express legal basis in the Treaty. This argument would appear to be supported by the fact that such an express legal basis was later introduced by the Lisbon Treaty in Article 82(2). However the Commission was of the view that an express legal basis was not necessary but was

⁸⁰³ See, John Spencer, *EU Fair Trial Rights - Progress at Last*, New Journal of European Criminal Law, (2010) Volume 1, Number 4, 447 and John Spencer, 'EU Criminal Law – the Past and the Future?', in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (Eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011

⁸⁰⁴ See: House of Lords EU Committee, *Procedural Rights in Criminal Proceedings*, 1st Report, Session 2004–05.

implicit. It was also felt that the notion of ‘trust’ which the measure sought to promote was too subjective to be measured and thus not a legitimate objective to justify the measure.⁸⁰⁵

Additionally, it was regarded that the proposed measure fell foul of the subsidiarity principle. The subsidiarity principle dictates that the EU is to legislate if the ends sought cannot be achieved by the MSs themselves. In 2004 MSs were confident that they were able to adequately protect HRs in both legislation and practice and that the adoption of EU common standards was not necessary. As Professor Spencer charts the changing positions of the UK he points out that the 2005 U-turn was not a complete block but a delay since between 2005 and 2009 the UK had once again changed their mind.

What changed their mind, for them to then accept the Stockholm Roadmap (pre-Lisbon)? Perchance it was the success of the EAW and the desire to keep it working as efficiently. The 2004 proposed FD was in anticipation of the implementation of the EAW, the Commission foresaw that HRs protection in practice could threaten the application of MR to this area and therefore sought to build a solid foundation for the mutual trust. The MSs did not have an appetite for further loss of sovereignty or any infringement into their criminal justice systems which they regarded as capable of protecting rights without outside interference. Perhaps they also felt that the principle of MR and the practice of non-inquiry would also protect their systems from outside scrutiny.

What is evident is that the Commission was correct in their conviction that EU measures safeguarding HRs are needed. The developments can be depicted with the MSs acting like children who only when faced with the possibility of losing their toys

⁸⁰⁵ See: Valsamis Mitsilegas, *The Constitutional Implications Of Mutual Recognition In Criminal Matters In The EU*, (n40)

(the EAWFD and other MR measures) agree to share the benefits of mutual trust with those EU citizens caught up in the MR web. It is not only important for authorities and judges to have true mutual trust in one another, but it is of equal importance that EU citizens have confidence that their rights will be protected across the EU.

Chapter Twelve: Stockholm

In 2004 the Commission opted for an instrument focusing on the basic safeguards rather than a wide-ranging instrument covering all rights. The view was that whilst a single instrument would have more coherence and consistency, it would be covering such a wide spectrum of issues that it would become complex and thus difficult to understand and implement.⁸⁰⁶ In order to set down the EU common standards a more scientific approach is required in this field. Aspects of the criminal justice systems need to be taken in manageable chunks. The current criminal justice systems of the MSs first need to be researched and reported on, before these can be synthesized together with the minimum standards as set by the ECtHR. This is the new approach being taken by the Commission.

At the end of 2009, under the Swedish Presidency, procedural guarantees were placed firmly back on the agenda with the UK and other's backing the plan. The Stockholm Roadmap⁸⁰⁷, as it is referred to, adopted a different mode to that of the 2004 proposal. Instead of setting out all the rights in a single measure, each right would be considered in turn (in accordance with the 'Roadmap') and a separate measure adopted for each. In total five measures were set out reflecting the essential rights as identified by the Commission in their 2004 proposal: (A) Translation and Interpretation; (B) Information on Rights and Information about Charges ("Letter of Rights"); (C) Legal Advice and Legal Aid; (D) Communication with Relatives, Employers and Consular Authorities; and (E) A Green Paper on Pre-Trial Detention. The rights whilst similar to those contained in the 2004 proposal, are broken down into manageable portions which it was

⁸⁰⁶ *Extended Impact Assessment*, (n800) 17

⁸⁰⁷ Stockholm Roadmap (n662), forms part of the Stockholm Programme which is the third in line of programmes after Tampere (1999-2004) and Hague (2004-2009) which seeks to further the EU's priorities in the AFSJ.

hoped MSs are capable of digesting. The progress of each measure will be considered in greater detail in the following section together with their compliance with HRs.

The reason as to why defence rights need to be additionally protected at the EU level remains the same. The Commission has recognized that insufficient levels of mutual trust exists between MSs and that if a State has “any doubts about the consistent and comprehensive compliance with fair trial rights...judges and prosecutors may be unwilling to allow the surrender of someone”.⁸⁰⁸ If these doubts are not effectively dealt with, they risk destabilizing the system of MR.

12.1 Measure A

Measure A of the Stockholm Roadmap focuses on the right to interpretation and translation. The Commission had drafted their proposed Framework Directive for Measure A, however before it could be considered the Lisbon Treaty entered into force. Using the new mechanism introduced by Lisbon MSs tabled an initiative, their draft Directive largely based on the Commission proposed FD. This has resulted in the adoption of the Directive on the rights to interpretation and translation.⁸⁰⁹ It requires MSs to implement legislation by 27 October 2013. The Directive obliges MSs to ensure that a suspected or accused person is provided, without delay, interpretation during criminal proceedings. The scope of proceedings begins at police questioning and continues until the conclusion of the proceedings. In addition to interpretation, individuals are also entitled to translation of essential documents within a reasonable period of time. It is left for the competent authorities to decide which other document is essential. The aim of both is to ensure that the individual understands the reasons for his arrest and the allegations against him in order to exercise their right of defence.

⁸⁰⁸ Commission, *Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*, COM(2010) 392 final SEC(2010) 908, Brussels 20.7.2010 SEC(2010)907, 7

⁸⁰⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

This right is based on Article 6 and the ECtHR jurisprudence which act as minimum standards but are extended to apply in EAW procedures. For example, in *Kamasinski v Austria*⁸¹⁰, the ECtHR stated that Article 6(3)(e) signifies that a person has the right to free assistance from an interpreter to translate the documents in the proceeding against him which are necessary for him to understand to benefit from a fair trial. This right does not extend to “a written translation of all items of written evidence or official documents in the procedure”.⁸¹¹ The assistance provided should enable the individual to understand the case against him and be able to put his defence forward.

Article 2 of the Directive provides that individuals are entitled to interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings. Additionally, Article 3 of the Directive provides that suspects will be entitled to written translations of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings, including: any decision depriving a person of his liberty, any charge or indictment, and any judgment. This provision fills in silence on the part of ECtHR as to the right to translation. Article 3(6) sets out the situation for EAW requiring only the translation of the EAW itself.

In order to ensure that these rights are effective in reality, MSs are required to ensure that the interpretation and translation is of sufficient quality. To this end they are required to establish a register of appropriately qualified interpreters and translators. The interpretation and translation is to be provided free of charge, even in the event of his conviction. The ECtHR has made it clear that an individual who does not understand

⁸¹⁰ *Kamasinski* (n666)

⁸¹¹ *ibid* §74

the language is entitled to this service “without subsequently having claimed back from him payment of the costs thereby incurred”.⁸¹²

Given that the Directive went beyond the ECtHR minimum standards, it could be considered ambitious and also testing the willingness of MSs to not only reconfirm the rights but to also adopt higher standards. Whilst MSs have appeared willing to do so, the Directive itself also provides some flexibility to MSs in its interpretation. For example the requirement that all judgments are translated relies on a MSs own interpretation of what is a judgment; in the UK, the decision of the Magistrates Court on the EAW surrender is not considered a judgment. The UK has opted-in to this Directive but has yet to implement it.

12.2 Measure B

The Directive on the right to information in criminal proceedings⁸¹³ sets out a “letter of rights” has also been adopted under Measure B encompassing many of the defence rights set out above.

The Letter of Rights contains practical details about the accused persons’ right to information about their procedural rights including information about the charges. The right to information about rights is not explicitly stated in the ECHR but has been implied in the ECtHR’s case-law.

Article 3 lists the procedural rights of which an accused or suspect must be informed of promptly orally or in writing. The other rights are (a) the right of access to a lawyer;⁸¹⁴ (b) any entitlement to free legal advice and the conditions for obtaining such advice; (c)

⁸¹² *Luedicke* (n747) §46

⁸¹³ EU, *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*, OJ L 142/1 of 1 June 2012. Member States have until April 2014 to implement the Directive. The Draft was published in July 2010 and endorsed by the Council of the EU on 3.12.2010.

⁸¹⁴ Largely following the ECtHR judgment in *Salduz* (n605)

the right to be informed of the accusation, in accordance with Article 6; (d) the right to interpretation and translation.

In addition to those rights listed in Article 3, Article 4 sets out the rights to be included in the “Letter of Rights” as they apply under national law. These rights are (a) the right of access to the materials of the case; (b) the right to have consular authorities and one person informed; (c) the right of access to urgent medical assistance; and (d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority. It should also include basic information about challenging the lawfulness of the arrest and detention. This right exists under the ECHR (Articles 5 and 6) and has been made an express right at EU level. It is interesting to note the changes introduced at the trialogue meeting between the European Parliament, the Council and the Commission. They included the addition of the right to silence, an additional provision setting out the need to take into account vulnerabilities and the extension of rights to apply not only to those arrested but also those detained.⁸¹⁵

The details highlight the difficulties which have to be dealt with when negotiating standards to be applied across different systems. One stumbling block was the original choice of words access to the ‘case file’. The UK objected to this because in their system the documents individuals have access to are not referred to as such. Eventually agreement was reached on the phrase “material of the case”. In anticipating objections the Commission also originally excluded the right to silence in the mistaken belief that such right did not exist in the UK. On the contrary the UK does have the right to

⁸¹⁵ For the proposed changes see: European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapporteur: Birgit Sippel, *DRAFT REPORT on the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings*, 2010/0215(COD), 20.12.2010.

silence, even though it is qualified by the caution that an officer gives when arresting an individual.⁸¹⁶

Consultation with ones' lawyer and others is also reflected under Measure B which provides that the individual must be informed of their right to contact an employer, a lawyer and their family.

Whilst these rights already exist either expressly or implied under the ECHR, their implementation is left to MSs. A study⁸¹⁷ into the provision of information about rights and the case confirmed that there are substantial differences between MSs in terms of the nature and amount of information they provide. These included the simple UK letter of rights to the dense legal text in the Czech Republic and in some jurisdiction nothing was provided in writing. This differing practice threatens the operation of mutual trust which requires rights to not only exist but to also be visible and apply in practice. As set out above, the Commission also regards the setting down of minimum standards as promoting MR.

The proposed "Letter of Rights" is to be provided (whether asked for or not) in writing or orally in the language understood by the accused, using simple everyday language (avoiding legal terminology). Two Model "Letter of Rights" are provided as part of the Directive. Annex I is for criminal proceedings and Annex II is specifically applicable in EAW cases. MSs are however invited to draft their own versions and to include additional rights beyond the 4 core rights set out in the models.

EAW proceedings are explicitly covered, the Directive makes applicable the procedural guarantees contained in Articles 47 and 48 CFR and Articles 5 and 6 ECHR to surrender proceedings based on an EAW. Article 5 of the Directive states that the

⁸¹⁶ For a good overview of the early debate which led to this misconception see Steven Greer, *The Right to Silence: A Review of the Current Debate*, MLR Volume 53 No 6, November 1990.

⁸¹⁷ Taru Spronken, *An EU-Wide Letter of Rights, Towards Best Practice (Ius Commune Europaeum)*, Intersentia, 2010

“Letter of Rights” to be given to those arrested pursuant to an EAW is to list the rights laid down in the EAWFD. The list of information to be given is taken from the EAWFD in order to maintain consistency at the EU level. These specifically include the right to be informed about the content of the EAW; confidential assistance of a lawyer; the right to interpretation and translation of the EAW; information about the possibility to consent to surrender including the consequences such as speeding up of proceedings and in some states the impossibility of changing it; and that if not consenting to surrender the right to a hearing.

It is not clear when the Annex II model ‘letter of rights’ changed for the EAW, the draft as adopted by the European Parliament contained an extensive list of rights, many of which are excluded in the final draft. One right which was deleted from the European Parliament amendment is the right to be released if not surrendered within 10 days of the court decision to surrender you, a right which is contained in the EAWFD. Perhaps the fact an arrested person has access to a lawyer is sufficient, thus relying on the lawyer to inform them of this right at the later stages of the proceedings. Other rights excluded include the right to remain silent and to be informed of the maximum detention period. This may indicate that the “Letter of Rights” set out in Annex I should also be applicable to those arrested under an EAW. Recital 39 of the Directive clearly states that the “right to written information about rights on arrest provided for in this Directive should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European Arrest Warrant... a Letter of Rights for such persons, a model is provided in Annex II.” However Recital 21 defines the meaning of ‘suspects or accused persons’ as those deprived of their liberty “within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights”. This appears to restrict the scope of those provisions to only those arrested for the purposes of being prosecuted whilst not making explicit reference to the EAW.

Those arrested under an EAW, are arrested pursuant to a decision of the I-MS.

Nevertheless it is often the case that their arrest by the E-MS is the first time they are made aware of the alleged offences. This arrest should therefore be treated in the same way as an arrest under a domestic arrest and the person should be informed of their right to silence thereby protecting them from making self-incriminating statements without the advice of a lawyer. However, having extended the applicability of Article 6 rights to EAW proceedings, the Directive on the right to information presents a schizophrenic stance, reverting back to the restrictive scope of the ECHR where certain rights do not apply to the EAW because of its similarity with extradition.

The UK letter of rights given to individuals was held up as a model example due to its simplicity and ease of understanding. It thus comes as no surprise that the UK has opted-in to this Directive.

12.3 Measures C and D

The right to legal representation and legal aid was to be addressed together by Measure C. They will now be considered separately. The right to legal aid will be considered once a study into the workings of legal aid across the MSs is completed.

The right to legal representation has been merged with Measure D. Measure D concerns communication with relatives, employers and Consular Authorities. The right to notification of family members is covered by Article 8 ECHR. The right of an arrested person to have their consulate informed of their detention and to receive visits from consular officials is not set out in the ECHR but is provided for in the 1963 Vienna Convention on Consular Relations.

A draft Directive on the right to legal representation titled Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon

arrest,⁸¹⁸ was presented by the Commission on 8 June 2011. Justifications for the adoption of this measure are set out in the impact assessment.⁸¹⁹ They include widely accepted reasons such as the practice of MSs as reflected in both the ECtHR cases and the CPT reports; which illustrate that in spite of the ECtHR setting out minimum standards they are implemented to differing levels. The Directive seeks to set out common standards in terms of the temporal scope (when the right to a lawyer starts) and the material scope (what activities the lawyer can carry out).

The Council draft under Article 6 introduces the right to communicate with consular or diplomatic authorities in line with the Directive on the right to information. However in other respects the Directive had been substantially watered down by the Council.

Following the Commission proposal on 22 September 2011, the Council of the EU exchanged its first views on the draft.⁸²⁰ At its meeting on 28 October 2011⁸²¹ it was updated on the state of play and considered the Presidency report.⁸²² The report highlighted the following 3 issues for further discussion: the scope of the directive (as to the nature of legal assistance), the situation when the right arises and remedies. On 7 December 2011, the European Economic and Social Committee adopted its opinion highlighting that the inclusion of the right to ‘suspects’ was a main contribution of the draft Directive, as well as the importance of confidentiality.⁸²³ At its meeting on 13 December 2011,⁸²⁴ the Council noted that the UK and Ireland had decided not to opt-in

⁸¹⁸ COM(2011) 326 final, 8.6.2011

⁸¹⁹ Commission, Commission Staff Working Paper, *Impact Assessment Accompanying The Proposal For A Directive of The European Parliament and of the Council on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings*, COM(2011) 326 final SEC(2011) 687 final. See also Commission Staff Working Paper, *Executive Summary of the Impact Assessment*, SEC(2011) 687, 8.6.2011

⁸²⁰ Council of the EU, Justice and Home Affairs, 3111th Council Meeting, Brussels, 22-23.09.2011, PRES/11/320

⁸²¹ Council of the EU, Justice and Home Affairs, 3121st Council Meeting, Luxembourg, 27 and 28 October 2011, PRES/11/397

⁸²² EU, Presidency, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - State of play 15812/11*, COPEN282, 21.10.2011

⁸²³ European Economic and Social Committee, *Opinion on the Right of access to a lawyer and right to communicate upon arrest on the Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM(2011) 326 final – 2011/0154(COD)*, SOC/424, 7.12.2011

⁸²⁴ Council of the EU, Justice and Home Affairs, 3135th Council Meeting, Brussels, 13-14.12.2011, PRES/11/491

to the Directive. It went on to consider the Presidency Report⁸²⁵ and noted the following issues for discussion: the scope, the applicable situation, possible derogations, information upon deprivation of liberty, access to a lawyer for EAWs and remedies. On 8 June 2012⁸²⁶ the Council adopted a general approach⁸²⁷ and begun negotiations with the European Parliament.

In the meantime, on 5 July 2011, LIBE was designated the Parliamentary Committee responsible for the Directive. It requested an Opinion from the Legal Affairs Committee on 15 September 2011 whose final report was adopted on 20 December 2011.⁸²⁸ It also invited the Council of Europe Secretariat to comment on the draft which it did on 9 November 2011.⁸²⁹ The Draft report of the LIBE Rapporteur was presented on 7 February 2012⁸³⁰ and the amendments tabled on 21 March 2012.⁸³¹ On 11 July 2012 LIBE, voted in favour of the draft Directive with only minor changes to the original Commission 2011 draft. Access to places of detention by the lawyer in order to assess the conditions was deleted by LIBE. Their view is that the control of detention conditions should be left to the public authorities. Regardless of whether a suspect is under arrest, they must be provided with legal advice as soon as possible and before being questioned by police. The right to communicate with their family or employer and their consulate is also retained by LIBE.

During the Council debate⁸³² on the measure Spain and Italy expressed concern about the derogations permitted from the confidentiality of meetings with a lawyer which they

⁸²⁵ EU, Presidency, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Progress report 18215/11*, COPEN 355, 6.12.2011

⁸²⁶ EU, Council of the EU (Justice and Home Affairs), 3172nd Council meeting, Brussels, 7 and 8 June 2012, PRES/12/241

⁸²⁷ EU, Council (Justice and Home Affairs), *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] - General approach 10908/12*, COPEN 136, 8.06.2012

⁸²⁸ European Parliament, Legal Affairs Committee (JURE), Jan Philipp Albrecht (Rapporteur), *Opinion on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, JURI_AD(2011)473811, 2.12.2011. See also JURE, *Draft Opinion JURI_PA(2011)473811*, 07.10.2011 and JURE, *Amendments 15 - 44 - Draft opinion*, JURI_AM(2011)475965, 17.11.2011

⁸²⁹ Secretariat of the Council of Europe, *Opinion on the Commission's Proposal for a Directive of the European Parliament and of the Council on "the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest"*, Strasbourg, 9.11.2011

⁸³⁰ European Parliament, LIBE, Elena Oana Antonescu (Rapporteur), *Draft Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, A7-0000/2012, 7.2.2012.

⁸³¹ See AMENDMENTS 44 - 177 on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, (PE474.063v02-00), 2011/0154(COD), 22.3.2012

⁸³² COPEN136 (nError! Bookmark not defined.)

consider a key pillar of the HRs of the person concerned. Together with Portugal they believe that as a matter of principle the application of derogations should be restricted and subject to law and judicial control in order to establish a high level of protection of HRs. They all share concerns about the exclusion of minor offences from the scope of the proposed Directive. These derogations are likely to be concessions made to entice as many MSs as possible to sign up. However, the derogations undermine a key objective of the adoption of such measures by creating a space for divergent practices to emerge.

Article 10 had previously provided for this right together with the prohibition of using “any statement made by such person before he is made aware that he is a suspect or an accused person” against them. The gap that this creates is where a suspect is labelled by the MS authorities as a witness but during questioning he becomes a suspect however continues to be questioned as a witness.⁸³³ Whilst the ECtHR has set out a number of indicators to be used to determine if a person is ‘charged’, it will be determined case by case. Unchanged this would have been in line with the ECtHR jurisprudence which makes clear that the designation of an individual by the authorities is not decisive. The introduction of the term “official interview” is another dangerous Council amendment. It opens another gap for authorities to ‘informally’ question those they suspect.

The Council ammendment to Article 4(2) also limited the right to confidential meetings between client and lawyer, allowing it to be circumvented in exceptional circumstances where:

- (a) there is an urgent need to prevent a serious crime; or
- (b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.

This again fell below the minimum standards set by the ECtHR. The ECtHR jurisprudence makes it clear that the right to legal assistance includes the ability to communicate with a lawyer ‘out of hearing of a third person’. Whilst this right can be restricted it should not deprive the applicant of a fair hearing. In *Brennan*,⁸³⁴ a police officer was present at the first meeting in order to prevent information being passed on to suspects at large. The ECtHR found that there was no compelling reason for the restriction and although of a restricted period it was at the first meeting with great importance to his defence, Article 6(3)(c) was violated. Article 4(2) of the draft

⁸³³ Cape and others (n714)

⁸³⁴ *Brennan v UK*, 39846/98, Judgment 16.10.2001, §§58- 63

Directive leaves the determination of whether these circumstances exist and if they warrant a restriction on the confidentiality of lawyer meetings to the national authorities.

Salduz together with other ECtHR cases indicate that incriminating statements obtained without the presence or previous consultation with a lawyer should not be used to convict a person. Where his right to a lawyer has been violated the remedy should put him back in the position he would have been had the breach not occurred. On this basis the Commission draft had in effect prohibited the use of such statements. The Council proposed Article 11 in conjunction with Recital 37 appears to have regressed this protection and offered a lower level of protection, it stated “should be determined by that court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures”. In other words the door was reopened for their admissibility and possible reliance to convict an individual.

The original draft Directive under Article 2 explicitly covers EAW proceedings. Of particular interest is the dual representation envisaged in Article 11 of the EC proposal, with the individual’s right to a lawyer extended to cover both the issuing and E-MS under Article 11 to run concurrently. Citing the *Salduz* line of authorities, the right to a lawyer exists from the moment that the individual is informed they are a suspect or accused until the conclusion of proceedings and must be granted at questioning.

This aspect was removed by the Council, providing only for legal representation in the E-MS. Over the years, best practice has developed amongst lawyers and NGOs which means that those representing individuals in cross-border cases will often seek out the assistance of colleagues in the other MS, especially if they lack knowledge of the language and the laws. This ensures that the rights are not only better safeguarded but that the case also proceeds more efficiently. It also provides continuity in legal assistance ensuring that this right flows as easily across State borders as the decision and EAW seeks to enforce.

Article 11(1) saw the word “promptly” removed and instead the phrase “in any event as soon as practically possible after the deprivation of liberty” inserted into Article 9(2). The right to ‘meet’ previously set out in Article 11(2) was replaced with the right to ‘communicate’ in Article 9(2). “The duration, frequency and means of communications between the requested person and his lawyer may be regulated in national law and procedures” when previously Article 11(2) stipulated that the right to meet “shall not be limited in any way that may prejudice the exercise of his rights under” the EAWFD.

The delegation to the national laws further restricted the right and leaves the door open for continued inconsistencies between the practice across MSs. Article 11(2) also provided for the lawyer to not only be present at questioning and hearings but also to “ask questions, request clarification and make statements”. Under Article 9(2) the role of the lawyer is once again restricted to that permitted by the national laws and procedures of the E-MS.

Under the Council draft Article 9(3) stated that the derogations permitted from the confidentiality of meetings with lawyers under Article 4(2) and the right to have a third party informed under Article 5(3) together with Article 7 applied *mutatis mutandis* to EAW proceedings. The waiver of the mandatory presence or assistance of a lawyer under Article 8 also applied to those arrested under an EAW.

On 21 March 2013, the Presidency of the Council requested Corper⁸³⁵ to consider two issues in order to assist with reaching an agreement with the Parliament.⁸³⁶ Firstly the Presidency proposes the deletion of the derogations added by the Council in their general approach. In doing so they note the importance attached to confidentiality by the Parliament and several MSs, the fact that the ECtHR has already identified it as a key principle, as has the CJEU. Secondly, the Presidency having noted the keenness of the Parliament for a right to legal assistance from a lawyer in the I-MS, it resubmitted the issue to MSs. It appears that MSs were ‘more favourably disposed’ to include such a provision. The Presidency proposal is the inclusion of the right to legal assistance from a lawyer in the I-MS, who would assist the lawyer in the E-MS by providing information and advice.

As set out above, the Council draft of the Directive made a series of significant amendments, following the trialogue on 28 May 2013, LIBE voted through key amendments on 19 June 2013.⁸³⁷ The Council had removed the guarantees afforded to those other than suspects or accused from the text of the Directive, it has now been re-introduced by Article 2a for those “who in the course of questioning...become suspects or accused”.

⁸³⁵ Permanent Representatives Committee (Article 240 TFEU)

⁸³⁶ Presidency of the Council, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] – Questions on selected issues 7564/13*, COPEN41, 21.03.2013

⁸³⁷ European Parliament, LIBE, *Amendment 178*, 20011/0154(COD), 6.6.2013

The prohibition of using statements made without legal assistance has been strengthened by Article 13(3) and also Recital 27 which re-states the ECtHR principle that “the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction”. Although it is not clear what the phrase “without prejudice to national rules or systems regarding admissibility of evidence” which appears in both will mean in practice. This is a view shared by the Secretariat of the Council of Europe who recalls that “the repeated reference to national law may affect the effectiveness of these instruments”.⁸³⁸

Council amendments to Article 3(3)(b), introduced a considerable restriction to the practical use of access to a lawyer before questioning however the right to a lawyer without undue delay has been re-introduced. Article 3(2) lists specific moments stipulating that access should be at the earliest of these moments.

Article 4(2) had also limited the right to confidential meetings between client and lawyer. Confidentiality (without derogation) has been re-introduced in Article 4.

The original draft Directive included dual representation in EAW proceedings. This aspect had been removed by the Council. Article 11(2)(b)-(d) once again re-introduces this right.

In the UK, the proposal was considered by the European Scrutiny Committee⁸³⁹ and whilst supportive of the measure, the recommendation was for the UK to not opt in to the measure from the outset. Whilst expressing that the UK has a high standard of legal

⁸³⁸ Secretariat of the Council of Europe, *Opinion on the Commission’s Proposal for a Directive of the European Parliament and of the Council on “the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest”*, Strasbourg, 9.11.2011

⁸³⁹ Access to a lawyer, HC Deb 7.09.2011, Columns 502- 516, available at: <www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110907/debtext/110907-0005.htm#11090767000002> European Scrutiny Committee, *36th Report together with formal minutes*, (HC 2010–12, 428-xxxii), 20-30 (Right of access to a lawyer and right to communicate on arrest), available at: <<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxxii/428xxxii.pdf>>

representation access beyond most other MSs, the UK government has a number of concerns with the current text. These include the absolute nature of confidentiality of meetings with their lawyer, the requirement for legal representation at investigatory stages such as search of property which goes beyond the ECHR requirements and with cost being the key concern. During the debate a number of oppositions to the motion to not opt in were expressed. The end result was that the UK will not opt in at this stage, but hopes that through negotiations, it will be in a position to opt in to the final Directive.

The indicative Parliament plenary sitting date, 1st reading/single reading is 10 September 2013.

12.4 Measure E

Measure E concerns special safeguards for suspected or accused persons who are vulnerable with the short explanation stating,

In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.

Work on this measure will follow the conclusion of a study into the issues.⁸⁴⁰ However, the particular needs of vulnerable individuals are already being taken into account when working on the other measures. In its Green Paper,⁸⁴¹ the European Commission suggests a ‘non-exhaustive’ list which includes: foreign nationals, vulnerable because of their nationality, linguistic disadvantage and other factors; children (under 18); persons with children or dependants; those who cannot read or write; those with a refugee status; and addicts. Defining the vulnerabilities enables proceedings to be adapted

⁸⁴⁰ This study is being conducted by Centre for Strategy & Evaluation Services on behalf of the Commission

⁸⁴¹ European Commission, *Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the EU*, COM(2003) 75 final, 19.2.2003

accordingly so as to enable effective participation. For example in the case of foreign nationals, to ensure that it is in a language they understand. Any definition needs to remain sufficiently flexible to accommodate the unique requirements of each case, which may for example also include vulnerabilities connected to the nature of the offence or the impact on family members. A proposal on this measure is expected in 2013.

12.5 Measure F

Measure F is the production of a Green Paper on Pre-Trial Detention the short explanation asserts that the different periods of pre-trial detention and the excessively long periods are not only prejudicial to the individual but can threaten judicial cooperation and are not compliant with EU standards.

On 14 June 2011, the Commission launched a consultation "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention".⁸⁴² The purpose of the Green Paper was to explore the extent to which detention issues impact on mutual trust, MR and judicial cooperation. The consultation covers both pre- and post-trial detention as well as detention related to the EAWFD and issues such as duration, conditions and provisions for children and the vulnerable.

From the summary of replies,⁸⁴³ it can be concluded that MSs do not have an appetite for legislative measures on detention. The general feeling is that existing measures and standards are sufficient and that adverse detention conditions have not been raised as stumbling blocks for the EAW. Nevertheless non-state actors who replied (international organizations, NGOs, professional associations and academics) support some legislative

⁸⁴² COM(2011) 327 final, Brussels, 14.6.2011. The consultation closed on 30.11.2011. All the replies can be found here: <http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm>

⁸⁴³ The following summary and conclusions on the Consultation are taken from: Commission, *Analysis of the Replies to the Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention*, 2012

measures. These organizations are well placed to know what is needed because most work on the frontline, seeing on a daily basis the realities of policies and how these existing standards are translated into the practice of MSs.

In terms of non-custodial alternatives to both pre- and post-trial detention, MSs were of the view that the ESO should be assessed before new legal measures were adopted (pre-trial), they supported instead non-legislative initiatives such as exchange of best practice. The other respondents emphasized the value of alternatives and the need for non-legislative measures to promote a wide range of alternatives. As noted above, detention should be a measure of last resort and MSs are under an obligation to consider less intrusive measures. The promotion of such alternatives to custodial sentences would be in line with HRs obligations.

Concerning the obligation to release an individual unless overriding reasons existed, according to all MSs restrictions on the use of pre-trial detention were in place and subject to safeguards. On the contrary the other respondents underlined the gap between the law and the excessive use of pre-trial detention in practice. In particular a number of issues were highlighted including overcrowded remand facilities and the excessive pre-trial detention of non-nationals. These are issues highlighted above in the review of HRs, including the CPT reports and bail.

Some MSs supported the adoption of shared⁸⁴⁴ common standards relating to the regular review of pre-trial detention which they felt that such measures could enhance mutual trust and lead to more efficient judicial cooperation. But they did not support the setting of maximum periods of pre-trial detention. Duration according to them was subject to a number of parameters (such as the judicial system, crime rates and national penalties) and they wanted to avoid automatic release once the maximum had been exceeded. The

⁸⁴⁴ The disparity between terminology and practices was highlighted by some organisations.

other half of MSs did not support the adoption of common rules and preferred the acceptance of the differences that exist between regimes within the existing parameters set by the ECHR and CFR. Thus one half are content to permit indefinite detention due to delays in national systems, whilst the other half misses the point that these differences do threaten the operation of the EAW. Neither group supports legislative measures.

The other respondents recognize that the different national practices are an obstacle to mutual trust and that the creation of a more uniform system of pre-trial detention across the EU through the adoption of minimum rules was required. A strong majority of these also supported the setting of a maximum period for pre-trial detention as well as standards on reviewing the lawfulness of continued detention.

In relation to whether detention conditions may undermine mutual trust and consequently the functioning of the EAW, the MSs are split. Some recognize that this is a possibility and that when raised they should be investigated before surrender, although most, on the basis of their case law, did not regard it as an issue. The other half are of the view that inadequate prison conditions should only be applied as a ground of refusal in exceptional circumstances. On the impact on the Transfer of Prisoners Framework, the majority of states reserved judgment until it was in force in all MSs, 10 MSs affirmed that detention conditions may adversely affect its proper functioning, whilst the UK alone was of the view that poor detention conditions should negatively affect its operation. A large majority of other respondents recognized that inadequate detention conditions could affect the proper functioning of the EAW. Some of these called upon MSs to assess detention conditions that an individual will face after surrender, in doing so they drew instructions from the obligation of states to investigate the realities which asylum seekers returned under the Dublin II Regulation would face; the same would apply to the Transfer of Prisoners FD. NGOs stressed the need to adopt common

minimum standards of detention and for information on prison conditions in the EU to be made more readily accessible. The adoption of EU minimum standards on detention conditions was also believed to assist in raising the standards, although some warned against the dilution of standards caused by duplication. However if common standards are to be adopted they should be aimed higher than existing rules. Either way, they should be complimentary to existing mechanisms and need to be further supported by EU measures to guarantee implementation in practice of common minimum standards. This will not involve duplication but rather include closer collaboration between the EU and Council of Europe. The implementation of common standards in pre-trial detention will also support MR measures such as the EAW and the ESO.

As set out above, whilst cases resisting surrender based on detention conditions are rare, this does not mean that it will remain to be the case. Even if unsuccessful the seed of concern is planted into judges every time this issue is raised and fails because the evidence of the risk was not specific to the individual or if assurances were obtained. Minimum standards of detention conditions need to be adopted and enforced so that judges are reassured and mutual trust can continue.

Chapter Thirteen: Added Value of EU Legislation

There exists a two layer protection of HRs between the EU and its MSs. The concerns over MS practice inadequately respecting HRs do not arise only in the cross-border elements, but relate to every aspect of the criminal justice system. The CFR is only applicable to MSs only when implementing EU law, for example the CFR is not applicable to the decision to issue a domestic arrest warrant for its own national located within its territory, however the CFR is applicable to the issuance of an EAW. Thus adoption of EU measures such as the Stockholm Directives has the effect of extending the scope of the CFR, i.e. not only to the implementation of the EAWFD but to criminal proceedings in general. The Directives adopted to date on the right to interpretation and translation as well as the right to information apply explicitly to EAW proceedings but also set out minimum standards which are applicable to the domestic criminal proceedings of MSs whether a cross-border nexus exists or not. This has the effect of creating uniformity across the EU MS criminal justice systems. It has the potential to reassure judges that due process will be followed and the procedural guarantees of an individual they surrender will be respected.

13.1.1 Enforcement and Evaluation

These new measures adopted as Directives will benefit from doctrines of supremacy, direct and indirect effect as well as state liability. Whilst the ECtHR has done a commendable job of promoting and protecting HRs across the Council of Europe, its mechanism is not ideal. Apart from reliance on political will for the enforcement of judgments, the process itself takes a long time. Before making an application to the ECtHR, individuals must first exhaust the effective domestic remedies available. Depending on the nature of the proceedings this may take a good number of years.

Whereas the financial costs of taking such proceedings are substantial, thus by the time individuals have exhausted the domestic remedies they be disheartened and unable to pay any further legal costs. Those who do make an application to the ECtHR then face long delays as the ECtHR attempts to grapple with the backlog of cases pending before it. The statistics for a successful case are also not on the side of the individual since only 5% of applications lead to a finding of a violation, with the vast majority of cases declared inadmissible.⁸⁴⁵ The mechanisms introduced by Protocol 14 to deal with the backlog do not increase the odds of succeeding.

On the other hand protection of rights set out in an EU measure is quicker. National Courts can make a preliminary reference under Article 267 TFEU to the CJEU during the course of national proceedings, thus removing the need to first exhaust domestic remedies. The timescale for delivery of CJEU judgments is faster, on average just over 16 months for preliminary references and 15-20 months for infringement proceedings and appeals to the General Court. Additionally in Article 267 TFEU provides for accelerated proceedings where the referred cases concern migration or security issues.⁸⁴⁶ This urgent procedure known by its French acronym PPU (*procédure préjudicielle d'urgence*), fast tracks preliminary references which require a prompt decision because they concern a person in custody, a vulnerable person or child. The turnaround of such cases is 3 months and it has been applied to a number of EAW cases.

As is evident from other areas, the CJEU has the power and potential to play a key role in the development of EU principles such as MR. Pre-Lisbon Treaty, in the AFSJ, MSs felt it necessary to limit the effect of the EU on their sovereignty. For this reason, an

⁸⁴⁵ Council of Europe, *Practical Guide on Admissibility Criteria*, 2011

⁸⁴⁶ An accelerated procedure was introduced by the CJEU in March 2008 and has already been used in a number of cases. Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24 of 29 January 2008, p. 42; Amendments to the Rules of Procedure of the Court of Justice, OJ L 24 of 29 January 2008, p. 39, and OJ L 92 of 13 April 2010, p. 12.

opt-in was given to MSs as to whether preliminary references concerning Third Pillar measures, could be made and by which courts.⁸⁴⁷ It is interesting to note that even if a MS opted not to grant jurisdiction to the CJEU, it was still entitled to intervene as a third party in cases from other MSs.

By restricting access to the CJEU, MSs felt that they could maintain control over the scope of MR within their criminal law. Nascimbe considers this restriction as a shortcoming in the protection of individuals within European judicial cooperation. He considers the “a la carte (or ‘variable geometry’) regime” as hindering “the uniform interpretation and application of European Community law in the member states and consequently jeopardises the main objective of the judicial protection system itself.”⁸⁴⁸

The CJEU has however adapted its jurisdiction and previous jurisprudence so as to extend its judicial protection to police and judicial cooperation.⁸⁴⁹ Reiterating that the purpose of a preliminary reference is to ensure uniform application of EU legislation across all MSs, it has given some words and phrases in Third Pillar measures an autonomous meaning. This uniform application also furthers the MR ambitions.

Gözütok and Brügge was the first case in which the CJEU was called upon to interpret a third pillar measure.⁸⁵⁰ The case is the first in a long line of cases asking the CJEU to clarify the meaning and application of Article 54 of the Convention Implementing the Schengen Agreement (CISA).⁸⁵¹ Article 54 concerns the application of the *ne bis in*

⁸⁴⁷ Under Article 35 of the EU Treaty (introduced by the Treaty of Amsterdam), MS needed to confer jurisdiction upon the CJEU to make preliminary rulings on the validity of measures implemented under Title VI. Those MS who granted jurisdiction could restrict which courts could refer to only their courts of final instance.

⁸⁴⁸ Bruno Nascimbene, *European judicial cooperation in criminal matters: What protection for individuals under the Lisbon Treaty?*, ERA Forum (2009) 10: 397–407

⁸⁴⁹ See Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285 and see also Case C-355/04 P *Segi et al v Council* [2007] ECR I-1579 for the extension of procedural guarantees. For a consideration of the two cases see Nascimbene (n848)

⁸⁵⁰ Jurisdiction was not an issue given that the referring Member States (Germany and Belgium) had both conferred jurisdiction to the CJEU under Article 35.

⁸⁵¹ CISA (n63)

idem principle (principle of double jeopardy)⁸⁵². Its treatment of this area is useful to elicit principles of general application. Firstly that it is important to ensure uniform application of EU law across MSs and that the CJEU has a central role in this task. Secondly, that the purpose of Article 2 EU Treaty was to establish an AFSJ within which the free movement of individuals was promoted. The *ne bis in idem* principle achieved this by seeking to avoid impeding this free movement through fear that an individual could be prosecuted for the same acts in a number of MSs. To this end it was deemed necessary by the CJEU to give the phrase “same acts” an autonomous meaning, referring to the nature of the act and not their legal classification under the national laws of MSs. In its own way this can be viewed as a shift away or at the very least a modification of the principle of MR.⁸⁵³

Some of the shortcomings flowing from the restrictions placed on the CJEU within the third pillar have been addressed by the Lisbon Treaty.⁸⁵⁴ In addition to the abolition of the pillar system, the suppression of the distinction between first and third pillar and the changes in the legislative sphere, the same legal remedies are now available.⁸⁵⁵

Preliminary references from the national courts to the CJEU can include whether the HRs point at issue is appropriate for consideration within the framework of the particular EU law. For example as seen above in the case of *IB*,⁸⁵⁶ one of the questions referred to the CJEU was whether HRs are to be considered as a ground for refusing to

⁸⁵² *Gözütok and Brügge* (n31); C-469/03 *Criminal proceedings against Filomeno Mario Miraglia* [2005] ECR I-02009, on the effect of initial proceedings being stopped; *Van Esbroeck* (n32) on meaning of “same acts”; *Gasparini* (n379) on effect of time bars; C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië* [2006] ECR I-09327 on applicability to acquittals as well as convictions and the definition of “same acts”; C-288/05 *Criminal proceedings against Jürgen Kretzinger* [2007] ECR I-06441 on meaning of “same acts” and also the stage of sentencing; C-367/05 *Criminal proceedings against Norma Kraaijenbrink* [2007] ECR I-06619 on meaning of “same acts”; C-297/07 *Klaus Bourquain* [2008] ECR I-09425 on amnesty laws.

⁸⁵³ In a similar vain the CJEU dealt with the related questions on the meaning of “finally disposed of” under Article 54 CISA (n63)

⁸⁵⁴ Lisbon Treaty (n173)

⁸⁵⁵ There is a transitional period of 5 years with respects to the measures adopted in the area of police and judicial cooperation in criminal matters before the entrance into force of the Lisbon Treaty (Article 6 Lisbon Treaty).

⁸⁵⁶ *I.B.* (n118)

surrender an individual. Unfortunately this was a question to be answered in the alternative to a previous question and the CJEU did not deem it necessary to answer. Nevertheless it remains an avenue open for use.

The competence of the CJEU to examine HRs can be summarized as follows: the compatibility of EU legislation with HRs;⁸⁵⁷ the compatibility of national implementing measures with HRs;⁸⁵⁸ when MSs invoke HRs as derogation from an obligation under EU law;⁸⁵⁹ and where the EU legislation concerns HRs.⁸⁶⁰ The EAWFD can fall under the first three categories. For example, the *Melloni*⁸⁶¹ case discussed above, asked the CJEU whether MSs relying on the CFR can offer greater protection of rights in relation to those requested under an EAW following a trial in absentia. The referring court noted that Article 4a in the EAWFD fell short of the protection offered under their Constitution and asked whether they could derogate from the grounds set out in the EAWFD. This was answered in the negative, with the CJEU turning the tables on the relevance of uniformity. Uniformity was in this instance important to protect MR, rather than HRs. In *Radu*⁸⁶² the CJEU was asked to rule on the compatibility of EAWFD obligations with the ECHR and CFR. The CJEU shies away from the broader question, despite the detailed Opinion from Advocate-General Sharpston. What can be taken from these two cases is that the CJEU on the one hand is giving an opportunity for measures to be adopted before it interprets particular rights, whilst on the other hand it is indicating that it is important for the adopted measures to reflect the highest acceptable common standards otherwise such measures will not serve their full potential of creating uniformity and certainty across the EU.

⁸⁵⁷ *Kadi*(n383)

⁸⁵⁸ *Wachauf* (n184) and *ERT* (n501)

⁸⁵⁹ *Omega* (n189)

⁸⁶⁰ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921

⁸⁶¹ *Melloni* (n122)

⁸⁶² *Radu* (n158)

The CJEU is increasingly called upon by national courts to interpret HRs under the CFR. The cases referring questions relating to the CFR are increasing year on year and the CJEU continues to emphasize that under Lisbon the CFR is given equal legal value to the Treaties and EU measures are to be assessed in light of the CFR.⁸⁶³ Whilst *Melloni* and *Radu* were disappointing in terms of their avoidance of dealing face on with the broader HRs issues, this appears to be more to do with treading carefully around the principle of MR whilst it is in its infancy in criminal matters rather than with the CJEU mandate on HRs.

The adoption of Directives on procedural safeguards under the Lisbon Treaty means that the CJEU also enjoys full jurisprudence enabling courts of all MSs to refer preliminary questions to consider conformity with primary law and the CFR. It can also consider conformity of national law including with respect to self-executing provisions. It can also be asked to interpret the scope or application of a particular right which might otherwise not have fallen within its competence.

Of most importance is perhaps the enforcement mechanism of the EU in comparison with the purely politically reliant enforcement system of the Council of Europe.⁸⁶⁴ This key difference is one reason why EU measures on HRs can promote judicial cooperation and MR measures. Whilst ECHR standards provide a useful starting point for setting EU-wide minimum standards and continues to act as a safety net, the enforcement mechanism of the EU is more powerful and can also lead to serious financial and institutional implications. The EU mechanism also aims to ensure uniformity of standards across the EU, which is what gives coherence to the EU system

⁸⁶³ For one example see the Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* [2010] ECR I-11063. Other cases include: Case C-555/07 *Kucukdeveci* [2010] ECR I-0000, §22; Case C-135/08 *Rottman* [2010] ECR I-0000; Case C-578/08 *Chakroun* [2010] ECR I-0000, §44

⁸⁶⁴ Once an ECtHR judgment is final, monitoring of its implementation passes to the Committee of Ministers, a body composed of representatives from the Member States.

and reassures judicial authorities that those who leave their control will continue to have their rights respected.

The Commission has its full powers including the bringing of infringements proceedings before the CJEU against MSs who fail to implement in full or correctly the Directive⁸⁶⁵ or are identified as falling short of standards set out in a Directive. Unlike ECHR judgments, these are binding and supported by strong enforcement mechanisms. Additionally, if a MS is found to not be complying with a particular Directive, the CJEU will impose a fine against them.

As set out above, the EAWFD is a measure which has proven extremely useful for MSs in their fight against crime. The ultimate sanction is suspension from the particular aspect of the *acquis* or if sufficiently serious from the EU as a whole. In addition to non-compliance with a Directive, Article 7 provides a political oversight of compliance by MSs, providing for suspension of a MS from the EU if its HRs standards fall short of the minimum standards acceptable to the EU.

The TFEU sets out a number of provisions relating to assessment and evaluation within the EU. The working methods, outcomes, effects and sanctions of these are not set out in detail the provisions.⁸⁶⁶

The CJEU will continue to play a significant role in re-aligning MS standards and ensuring compliance with obligations. *Schecke*⁸⁶⁷ underlines the fact that for

⁸⁶⁵ Under Articles 258 and 260 TFEU. See Annex 6.

⁸⁶⁶ Detailed consideration of these is beyond the scope of this research. It is enough to note that whilst extensive mechanisms exist, these are not a panacea. For example, Article 70 TFEU provides for Member State assessment together with the Commission, however the relationship between the two in this assessment is not clear. Participation of the Fundamental Rights Agency in Article 70 assessments is also not clear and neither is the relationship between the two evaluations. Other questions include what principles/criteria will be used to evaluate and who decides these; whether the reports will be made public; what sanctions could be imposed following a finding of non-conformity, Article 70 specifies that the evaluation is without prejudice to Articles 258-60 infringement proceedings and so the Commission may bring infringement proceedings following a negative evaluation, Article 7 is also not excluded; and whether the Commission's role as 'watchdog' will be compromised in favour of Member State evaluation.

⁸⁶⁷ *Schecke* (n863) also the Opinion of Advocate-General Sharpston.

proportionality to be effectively respected it needs to be reinforced by assessments “of less intrusive policy alternatives and by internal processes guaranteeing that such an assessment is in fact carried out and documented”.⁸⁶⁸ This obligation is placed on the EU and its institutions as well as the implementing MS.⁸⁶⁹

⁸⁶⁸ Clemens Ladenburger, *FIDE 2012 – Session on "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions"*, Institutional Report, 2012

⁸⁶⁹ In *Schecke* (n863) this included the requirement, provided for in the Directive, for Member States to conduct ‘prior checks’ to determine the processing operations likely to present specific risks to the rights and freedoms of data subjects.

Part IV: Final Conclusions

Chapter Fourteen: Hysteron Proteron

As the Ancient Greeks would put it, the application of MR in criminal matters and the EAW is arguably an example of *hysteron proteron*.⁸⁷⁰ The EAW and MR measures in criminal matters cannot survive on the basis of presumptions alone. It is important to first ensure that the common standards relied on for mutual trust exist in practice. The importance of reinforcing HRs within the EAW system and criminal matters more generally is no longer a grey area but is set out in black and white not only by the Commission, practitioners, academics and NGOs but also by national courts and institutions of the MSs as well as the CJEU. HRs are the key to promoting mutual trust and thus protecting the principle of MR.

The real dangers of the EAW is that an individual could be surrendered on the basis of evidence obtained by practices not accepted in the E-MS. They could remain in pre-trial detention for periods intolerable in the E-MS with no likelihood of obtaining bail as a non-resident and kept in sub-standard conditions. However, according to MR, all these risks are minimised because the I-MS is a signatory to the ECHR and if they fail to protect HRs either the first time or the second time (to ECHR standards), the individual can apply to the ECtHR for a remedy.

14.1 Common standards first

The contention and justification for MR is that it is sufficient for HRs to be mentioned in the MR instruments. It is clear that the required protection is not, as originally believed by the MSs, sufficed through proclamations and membership of the ECHR. A mere declaration of HRs in recitals is sufficient to make the implementation of a

⁸⁷⁰ Putting first what temporally belongs second.

measure compliant for the legislator but necessitates a more concrete foundation; these common standards need to exist in practice and not only in theory. The practice of MSs needs to be supported and recorded by a monitoring and enforcement mechanism more efficient than the ECHR.

States have individually subscribed to obligations under HRs treaties however, “the structure of international society is changing. The State is no longer the exclusive decision-maker and administrator over its territory because to varying degrees, it has come to share these roles”.⁸⁷¹ The existing legal landscape within the EU has changed too; aspects of the criminal justice systems of MSs are fusing together, there exists overlapping jurisdiction and intersecting obligations. As illustrated by the EAWFD, cooperation is no longer bilateral or territorial; it follows that the protection of HRs within the EU cannot be ring-fenced by sovereignty, territory or mutual trust.⁸⁷² In the single AFSJ, all MSs share in the responsibility for HRs protection within the “area”.

Built-in HRs safeguards which exist in traditional extradition have been omitted from the EAWFD (political offence exception, abolition of dual criminality and HRs). The UN Model Extradition Treaty includes mandatory grounds of a non-discrimination provision and a free-standing HRs ground.⁸⁷³ The exclusion of these grounds is a symptom of MR, with mutual trust alone expected to fill the gap.

Justice can be evaluated objectively; however trust is a more subjective concept. When referring to ‘mutual trust’ what is meant? Does it take on its ordinary meaning? What is

⁸⁷¹ Butler (n372) 125

⁸⁷² Extraterritorial jurisdiction for human rights violations in *Soering* following *Ng v Canada*, CCPR/C/49/D/496/1991 (1993)

⁸⁷³ Article 3, UN Model Treaty on Extradition (A/RES/45/116, 68th plenary meeting, 14.12.1990): “...(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons; [...] “(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;”

being trusted; the judges, the respect for HRs, the respect for the rule of law, the procedural guarantees, the criminal justice system? By whom do they need to be trusted? At what level does this trust reach and when is it rebuttable?

As a term 'mutual trust' is nebulous, open to different understandings and difficult to assess, it is not a legal term, but rather falls within the more capricious area of politics. Uniform standards are absent; nevertheless, despite all the above, mutual trust is a necessary and crucial component of MR in criminal matters. Judges are being asked to trust (blindly) all of the above, but with sweeping distrust existing under the veil of MR. Whilst the law can support trust building and provide remedies; it cannot create on its own the requisite trust. This flows from the practice and the building of relationships between not only the judges, but also the other state institutions as well as the citizens themselves. Judicial networks are mechanisms capable of building trust and once trust is established between judicial authorities it needs to be trickled down to authorities and citizens.

One cannot help but wonder whether mutual trust is a replacement for the ability of the executive to turn a blind eye under the previous extradition system. Whereas the ECtHR principle of equivalent protection applies, MR appears to nullify it through the policy of non-inquiry. The principle of non-inquiry is applied strictly, following a similar line of argument; that the I-MS is best placed to deal with any complaints and that its criminal justice system is trusted to respect HRs. The principle of non-inquiry is neither new nor unique to the EAW, but has been applied to varying degrees by states in the guise of international comity.⁸⁷⁴ In practice courts have been hesitant to sweep aside mutual trust and the presumption has been extremely difficult to rebut. However, almost a

⁸⁷⁴ See John Dugard and Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, The AJIL, (1998) Vol.92 No.2, 187-212

decade of implementing the EAWFD, judges are slowly releasing the mutual trust noose.

The role of the judges, as both gate-keepers and guardians, is to keep the system moving whilst at the same time ensuring that the rule of law is respected. What they have been doing one pigeon-step at a time is trying to determine at what level MSs can accept doubts and challenges to mutual trust without the MR programme being undermined. The boundaries have been broached within the asylum *acquis* with judges receiving their instructions to conduct effective and not merely cursory reviews and to use their margin of discretion to determine whether the presumption of trust is rebutted. Dublin II provided a specific provision whereby a state could elect to consider an asylum application instead of sending the individual back to the first MS. The EAWFD provides the space for MSs to take over the prosecution of individuals in certain circumstances, to take over the execution of a sentence or to make surrender conditional upon the individual being returned to serve their sentence if convicted. *N.S.* provided the opportunity to the CJEU to send a message to the politicians⁸⁷⁵ and to open the door for national judges to look at HRs without threatening the relationship between MSs. The EAW system could reflect the *N.S.* judgment, enabling MSs to request further evidence and to obtain assurances when alerted to potential HRs violation, without jeopardising the reciprocity integral to MR. Over the past decades HRs as a branch of international law has grown in terms of acceptability and respect. The danger is that the unmodified application of MR through the EAWFD and other instruments may now relegate HRs; the need for more active protection in practice cannot be ignored. Failure to improve the EAW system could mean that a similar judgment may be awaiting the criminal justice area.

⁸⁷⁵ Reform has begun of the asylum *acquis* and FRONTEX was also deployed to the Hellenic-Turkish border.

The CJEU's view is that the system is workable without harmonization but requires respect for autonomous and uniform application of rules. It was always envisaged that MR measures would be accompanied by HR in the AFSJ to include justice for all. Standardisation of common minimum standards relating to procedural guarantees and HRs is required to support MR.

The key rights considered in Part II all occupy an important position in the MR mechanism. They illustrate the vulnerabilities of both the individual concerned and the MS criminal justice systems. Despite this they are not adequately (if at all) provided for in the EAWFD. Whilst the obligations emanating from some rights are clearly stated and restated by the ECtHR they are trumped in the enforcement of EAWs by strict obedience to the principle MR. Amongst them is the extraterritorial reach of HRs obligations when surrendering an individual from their control to face HRs violations.

Existing HRs obligations cannot be ignored, trumped or nullified by MR measures such as the EAWFD. Within the EU there is a 3-fold protection system: (1) CFR; (2) ECHR; (3) principles resulting from common Constitutional rights of MSs. These may be common values but they are not commonly adhered to across the MS. All is not rosy in the Union as illustrated by the ECtHR case-law and the distrust shown to the newly acceded MSs (Romania and Bulgaria) who are subjected to periodic evaluations post-accession in their fight against corruption and organised crime respectively.⁸⁷⁶

The UK is one example of implementation which goes beyond the EAWFD grounds, notably in the transposition of Recital 12, additional grounds of 'extraneous considerations' and passage of time, a human rights compliance requirements and protection of those tried in absentia. Trials in absentia are not adequately covered even

⁸⁷⁶ Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (notified under document number C(2006) 6570) (2006/929/EC), 14.12.2006

by the amended EAWFD. Whilst the UK guarantees surpass the EAW requirements, the CJEU in *Melloni* prohibits MSs from going beyond the guarantees provided for in EU law and by extension from refusing surrender on the basis that a flagrant denial would occur. This is inconsistent with the notion that these are ordinarily minimum standards and MSs are encouraged to aim higher.

In other respects, fair trial rights under Article 6 ECHR do not go far enough for the EU context and its new landscape. Extradition does not come within the autonomous meaning of a ‘criminal charge’ before the ECHR and therefore not all guarantees are applicable to the E-MS proceedings. The ECtHR reasoning is defective, relying on mere proclamations or analogies with aliens. However, the scope has been explicitly extended to cover EAW proceedings by the CJEU, Articles 47 and 49 CFR and the adopted Stockholm measures.

The prohibition under Article 3 is absolute, carrying negative and positive obligations for both the I-MS and E-MS. It applies to an EAW arrest in the E-MS with *Soering* extending the obligation to cover the internal situation of the I-MS. Currently the burden of proof is on the individual and the threshold is high with the alchemy increasing the threshold when extradition is added to the formula. Recent cases show a shift towards sharing the burden with a duty on the courts to actively consider allegations of real risks. The principles elucidated in *MSS* and *NS* are arguably applicable to the AFSJ *acquis* including the EAW and the opinion of Advocate-General Sharpston in *Radu* (although not braved by the CJEU) provides good guidance on the application of the appropriate test to the EAW.

Whilst some regard the EAW as being implemented automatically, this is not entirely accurate. Execution of an EAW “cannot be applied automatically but must, on the contrary, be viewed in the light of the personal and human context of the individual

situation underlying each request”.⁸⁷⁷ The appearance of automaticity stems from the high presumption associated with mutual recognition. Checks and controls are at least in theory available in the form of the exhaustive list of grounds for refusal, human rights obligations of Member States and adjudication by the independent judiciary. These may be limited but they alter MR which in other spheres operates with automaticity.

These grounds are being gradually given autonomous meanings by the CJEU. The caselaw indicates that the CJEU is prepared to give a wide margin of discretion to MSs. For example it has shown leniency towards E-MSs when the issue relates to their own nationals and those in their territory. This may be because such cases do not have any bearing on reciprocity and mutual trust and are implemented under the guise of protecting the rights of individuals with a good reason to remain in the country (nationality, residence or staying). On the contrary cases relating to trials in absentia and concerns about human rights in the issuing state directly effect on reciprocity and mutual trust and the CJEU has so far taken a narrow approach.

The implementation of the EAWFD in practice has turned into a conveyor belt, placing almost all the emphasis on the I-MS and failing that the ECtHR to ensure respect for HRs. MR trumps HRs obligations in the eyes of many judges, requiring the production of exceptionally strong evidence that an individual’s rights risked being violated before the presumption can be rebutted. However, this hard-line shows signs of softening. National judges are finding it harder to rely on MR to dispel HRs arguments. MR has its limits and as its fog slowly fades through litigation and reports, mutual trust will need to be supported by more concrete measures – both legislative and non-legislative.

⁸⁷⁷ *Lopes Da Silva Jorge* (n131), Opinion of Advocate-General Mengozzi

14.2 Mutual Recognition Second

Under EU law the relationship between state and individual is one of citizenship and territory, whereas under human rights it is one of jurisdiction and control. In antithesis however to Europe's dissolving internal borders, MR territorially ring-fences MS's criminal justice system from external scrutiny. The tension thus appears to be between fulfilment of human rights obligations and respect for MR.

What is common to all of these grounds is a lack of trust in these authorities. If our courts were to accede to such arguments, they would be defeating the assumption which underpins the Framework Decision that member states should trust the integrity and fairness of each other's judicial institutions. This is a course that we should not take.⁸⁷⁸

The position of the UK Supreme Court is telling of the goliath struggle individuals face in attempting to rebut the presumption of mutual trust.

MR is not only recognition but requires a presumption that the decision was reached following due process and that it is trustworthy. MR gives domestic criminal laws and procedures of I-MSs extraterritorial reach and transnational application, impacting on the power of the E-MS and on the liberty of the individual. This needs to be matched with extraterritoriality of their HRs obligations which are attached to these procedures. To some extent this need has been recognised by the EU itself; an illustration is the EU's extended scope of the right to a fair trial which under the CFR applies to EAW proceedings in the E-MS.

Since the judiciary has been left in charge, they should be empowered to assess human rights at the point when the issue is first raised; whether this is before the I-MS or E-MS. The buck can only be passed if it is evident that it would be appropriate and not because of the principle of mutual recognition, the possibility of undermining mutual trust and concerns about reciprocity.

⁸⁷⁸ *Jaso* (n447) §77

14.3 Are Amendments to the EAWFD Required?

As illustrated in the following graph, extradition proceedings across the EU have been fast-tracked under the EAW system.

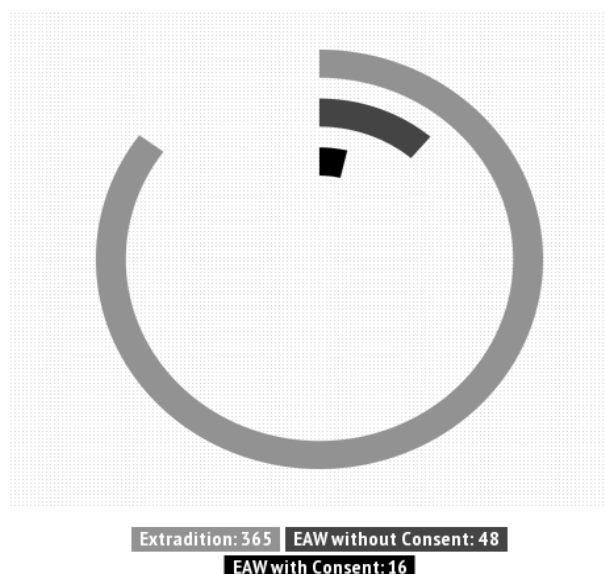


Figure 1: Average days taken to extradite or surrender

The EAWFD objective to speed up and simplify the process is no excuse for diluting the protection provided under Article 6⁸⁷⁹ or any other right. The deletion of the bar on surrendering own nationals is another reason/incentive for MSs to prevent exposure to sub-standard treatment/conditions in other MSs. It is both in their interests and their obligation to ensure that the treatment/conditions they are sending, not only their own nationals to but others within their jurisdiction, to are not sub-standard.

Between 2005-2009, MSs issued 54,689 EAWs leading to a total of 11,630 surrenders;⁸⁸⁰ thus proving useful in both the fight against crime and the promotion of internal security in the EU. In recognizing its success, the Commission also acknowledges that the EAW's efficacy is being threatened by anxiety over HRs respect including its disproportionate deployment. In their report on the UK's opt-out decision,

⁸⁷⁹ See *Barbera* (n271)

⁸⁸⁰ Commission Report: 2011 (n118)

the EU committee recognises the EAW as the ‘single most important pre-Lisbon’ measure. Whilst accepting the criticisms and problems encountered in its implementation, it concludes that these will not be addressed by alternative extradition measures and that the injustices were not a direct consequence of the EAW but rather of wider issues in the criminal justice systems and prisons of Member States.⁸⁸¹

Whilst similarities exist with extradition, the EAW is a new generation of cross-border cooperation, deleting the pre-existing ‘muddle’, introducing a fast-tracked and standardised system of ‘criminal’ exchange. Its features exemplify MR and mutual trust, such as abolition of dual criminality for 32 offences. Given that the EAWFD was adopted as part of the fight against terrorism, these offences have a tedious link to terrorism, they lack an intrinsic cross-border nexus and there is a lack of common understanding of what some of the offences entail. Whilst harmonization of all these offences is not currently possible, the creation of a matrix comprising the elements of the offences for each MS will go a long way in aiding both the central authorities, courts and counsel. Although not legally binding, it can be used as a tool to assist with linguistic difficulties as well as promoting understanding and thereby mutual trust.

At the end of the 5 year transitional period will a Lisbon-ised EAW measure be adopted?⁸⁸² There are strong reasons for the EAW to be reviewed in light of almost a decade of day to day implementation by MSs. It is likely that there will be strong resistance from MSs to change a system which to date continues to serve their needs with minimum obstacles.

MR and the EAWFD have created the need for additional protection and action by the EU which did not previously exist. Under the earlier system extradition operated within

⁸⁸¹ House of Lords European Union Committee, EU police and criminal justice measures: The UK’s 2014 opt-out decision, 13th Report 2012/13 HL Paper 159, 23 April 2013 at §160-1 see also Chapter 6 on the EAW

⁸⁸² TFEU Article 10(4)

different parameters, MR and the EAWFD now trump all of these. As the EU expands its reach into individual liberty, it needs to balance its increased scope with additional protection within the EU. It is evident that the effects of the EAW on HRs cannot be adequately covered by the ECHR. The following are proposed amendments to the EAWFD will facilitate increased compliance with HRs and trust-building.

14.3.1 Proportionality

The E-MS bears an obligation to conduct a proportionality test where a potential violation of a (qualified) HR is brought to their attention. Whether an explicit or implicit HRs ground exists in the EAW context, HRs obligations under the ECHR, CFR and national Constitutions will come into play as well as their obligation under Article 6 EU Treaty. This means that at a judicial level, judges are already obliged to conduct a proportionality test when HRs are sufficiently raised. However, MR has made them hesitant to do so or deflated the weight to be given to HRs.

The introduction of a dual proportionality test will assist in the reduction of unfair EAWs. Proportionality may pose a problem given that the triviality of an offence is largely cultural, in the sense that the stealing of livestock may be of greater seriousness in an agricultural reliant society as opposed to an urban society. However, appropriate consideration of all factors, including the seriousness of the offence, would avoid such situations. The initial assessment of proportionality will lie with the I-MSs, requiring them to consider proportionality before issuing an EAW. The current problem is that some MSs do not have a proportionality test in their domestic systems. The introduction of it into EAW proceedings would leave their national systems unaffected, but when engaging with an international mechanism the proportionality of doing so will need to be considered.

Although some may regard it as non-compliant with the principle of MR for the E-MS to determine the proportionality of a request, is a commonly accepted principle amongst MSs and a general principle of the EU which has been added to the amended EAW Handbook.⁸⁸³ The proportionality principle is also set out in Articles 49(3) and 52(1) CFR. It could thus be added, in line with EU law, to the EAW form and whilst a simple tick box will not be sufficient on its own, it will mean that some thought would have been given and also opens the door for E-MSs to query an EAW on the issue of proportionality. Proportionality checks are already included in the implementing laws of several MSs (Ireland, Cyprus, Belgium, Finland, Sweden, Luxembourg and Austria).⁸⁸⁴

The second assessment by the E-MS is particularly important where the wanted person has been living for a long time in the E-MS, since they will be in a better position to assess their situation, in particular when Article 8 ECHR is engaged. If there is no political appetite amongst MSs for the secondary proportionality review, an option could be to introduce a procedure whereby the proportionality of requests is challenged in the I-MS, including the submission of evidence on the person's current situation in the E-MS.

14.3.2 Failed EAWs

The deletion or withdrawal of EAWs is another mechanism which needs to be introduced. This mechanism can be based on the MR of the E-MS's decision. Currently when an EAW surrender is refused by one MS there is nothing preventing the individual from being arrested under the same EAW in the remaining 25 MSs (i.e.)

⁸⁸³ The principle of proportionality in both the ECtHR jurisprudence and the EU⁸⁸³ has neither a uniform definition nor a uniform application. . See Takis Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in Evelyn Ellis (ed), *The Principle of Proportionality*, 1999. It differs depending on the circumstances and subject matter under consideration. To this end guidelines (or extending the EAW Handbook) would be of use to ensure consistency.

⁸⁸⁴ Mariana Sotto Maior, *Chapter 12: The Principle of Proportionality: Alternative measures to the EAW*, in Keijzer and van Sliedregt (n81) 221

decision is not recognized in other MSs and the EAW request is not and cannot be automatically deleted.

This is illustrated by the case of Deborah Dark who was arrested in Turkey, Spain and the UK under an arrest warrant issued by France for a 20 year old conviction she knew nothing about. Despite the fact that 2 MSs, had both refused to surrender her on the basis that it would be unjust to do so, France refused to remove the EAW request. On May 2010 following intense campaigning France agreed to remove the EAW.⁸⁸⁵ It is worth noting that the withdrawal of the EAW was not as a direct result of the legal decisions of the 2 MSs or judicial cooperation, but rather due to lobbying campaigns conducted by NGOs and others. In addition to withdrawal of an EAW, a requirement for I-MSs to review and re-issue EAWs after a certain time period (e.g. every 2-3 years) could also be added, streamlining the EAW system.

14.4 Is the ECHR Enough or are Additional EU measures Required?

Hodgson⁸⁸⁶ regards the margin of appreciation as the problem leading to the differing HRs protection across the EU. However, even when the margin of appreciation is activated, MSs are still expected to respect the minimum standards, the problem may be that the minimum standards are too low for the EU. The delays in the enforcement mechanisms of the ECHR increase the need for more immediate measures to fall in line with the new fast track 'extradition' process. EU MSs would benefit from best practice guides on how to fulfil their obligations, EU standards can also assist in mutual trust by making the standards visible and introducing an additional enforcement mechanism.

The 3 cases studied in detail illustrate the impact of the EAW in practice. *Stapelton* highlights the tension between MR and judicial instinct to protect and prevent HRs

⁸⁸⁵ Further details can be on the Fair Trials International website, found at: www.fairtrials.net/cases/spotlight/deborah_dark/

⁸⁸⁶ Jacqueline Hodgson, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*, NCLR, (2011) Vol. 14, Number 4, 611-65

violations at the first opportunity. *Assange* concerned a multifaceted attack on the EAWFD, showing the reliance on the I-MS definition of the 32 EAW offences, the watered down specialty rule when the description of the offence is permitted to be vague,⁸⁸⁷ the potential abuse by using the EAW for investigation rather than prosecution purposes and the deferral to the I-MS to determine the appropriate ‘judicial authority’. It underlines the practice of non-inquiry and non-interference. *Campbell* provides the ray of hope for human rights and illustrates a synergy between the courts and lawyers which resulted in the successful resistance of surrender through the fulfilment of the relevant test by provision of sufficient evidence.

MR measures in criminal matters are one-sided with the successful and effective EAWFD at the helm. The elephant in the room was for a long time the absence of HRs reinforcement. The EAWFD sister Framework Decision (the 2004 proposal) failed due to lack of support based on a misguided belief that the national laws of MSs were adequate and arguments of it lacking legality. Nevertheless the needs set out in the 2004 proposal (to counterbalance judicial cooperation, for divergent practices to be more visibly equivalent and for their uniform application) remain the same for the Stockholm Roadmap. The Lisbon Treaty supports increased HRs protection through the altered legislative process, removal of the democratic deficit and the elevation of the CFR. EU accession to the ECHR is progressing and will allow external scrutiny, although it is not clear how this will interact with the principle of equivalent protection. The added value of EU measures on HRs is primarily the enforcement and evaluation mechanisms which include the bringing of infringement proceedings and the CJEU jurisdiction. It is also hoped that they will create uniform protection of HRs in practice.

⁸⁸⁷ Some appeals have been successful on this point, for example where the EAW is so vague that it is not even clear whether the person is wanted for trial or has already been convicted of the offence, see: *Moulai v Deputy Public Prosecutor of Creteil, France* [2009] EWHC 1030 (Admin)

Obligations in Recitals 12 and 13 and Article 1(3) EAWFD are uncontroversial and generally accepted by the MSs, it should therefore not be controversial for them to be elevated within the EAWFD. This would at least lead to consistency of protection amongst MSs and HRs would be safeguarded, including in accordance with the E-MS's HRs obligations.⁸⁸⁸ The amendments should be in line with the adopted Stockholm measures, whilst leaving scope for future improvements.

General thresholds can be elicited from the jurisprudence of the ECtHR as summarized by Lord Bingham in *Ullah*. Under Article 3 a real risk needs to be shown (an evidential burden). Article 6 requires a flagrant denial of the right before a potential interference can equate to a violation and in turn a bar on surrender. The benchmark to be met needs to be established, including what evidence is acceptable, required and sufficient. The ECHR standards exist, it is simply a matter of the national courts translating them into practice and applying them to the EAW. In the asylum context both the CJEU and the ECtHR have indicated what this may be and should act as further guidance for those implementing the MR in criminal matters programme. The considerations which, centre on security issues, combine to give extradition its profound importance leaving no room for the individual.⁸⁸⁹ The reciprocity factor within the EAWFD is the ability to bring suspects to justice. The reciprocity factor across the EU should also be to protect the HRs of one another's citizens and acting in good faith.

When assessing potential HRs violations, the Courts refer to the need for exceptional circumstances. The reality is that it would be exceptional if HRs protection existed at the mythical level which MSs are expected to trust it does. HRs are protected at varying degrees and violations do occur in all EU MSs as recorded in the jurisprudence of the ECtHR. "One of the problems with the way in which a lot of European criminal justice

⁸⁸⁸ *Soering* (n177)

⁸⁸⁹ In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21 (36) cited in *HH, PH and F-K* (n528)

has emerged is that it presupposes a kind of mutual confidence and common standards that actually don't exist."⁸⁹⁰ Visible and tangible respect for the rights of those individuals caught up in the MR machinery is the key to its success.

14.5 Has the EU law Adequately Addressed the Challenges?

In theory HRs are protected at international, regional and national level, however, MR and mutual trust displace this protection in practice. It is not necessarily that no regard has been given to human rights but rather the manner in which it has. Human rights protection was based on presumptions, that human rights are protected across the EU are analogous with an empty box whose shell enables the fast tracked and near automatic surrender of individuals. The actual protection is not sufficiently detailed to create the requisite clarity and certainty for mutual trust.

The lack of a HRs ground in the EAWFD has not prevented the inclusion or development of HRs grounds of refusals in the implementation of the EAWFD by MSs. What it has led to is the development of inconsistent HRs grounds across MSs. Some grounds are explicit with some applying a higher threshold test, others are disguised as proportionality or 'oppressive' tests, some have adopted only partial HRs grounds implementing Recitals 12 or 13 as grounds whilst others have no HRs ground at all.⁸⁹¹

Croatia is an interesting case study to consider on this point. As a candidate country, it was obliged to implement EU measures strictly before becoming a Member State and did so in relation to the EAWFD and other MR measures. In response to the FIDE 2012 questionnaires the Croatian Rapporteurs state that in fulfilling its obligations to implement these measures it has led to a lowering of HRs protection. In relation to the

⁸⁹⁰ Lord Justice Thomas, Transcript of oral evidence given to the Scott-Baker Enquiry, Evidence given on 7.04.2011, p.2127. Available online at: <http://www.homeoffice.gov.uk/publications/police/oral-evidence/>

⁸⁹¹ The Czech Republic and Estonia.

EAWFD they state in particular that Article 4(a) dealing with trials in absentia does not meet either the ECHR or the Croatian standards.⁸⁹²

The catch up game being played via the Stockholm Roadmap shows that the theoretical presumptions made were not sufficient and that before such presumptions are relied on it is important for these rights to be harmonised. The minimum standards need to be uniform across the EU. The protection mechanisms in MSs need to be all on par with effective implementation of these standards.

As set out in the recitals of the Directives adopted to date following the Stockholm Roadmap, the justification is promotion of MR through increased mutual trust. This enables the ability to consider decisions equivalent and trusting that the protection of procedural guarantees has been applied sufficiently. The latest Directive discussed goes further by making a direct link between the setting of common minimum standards, efficient judicial cooperation, mutual trust and the promotion of a culture of human rights in the EU.

The Stockholm Roadmap breaks the procedural guarantees down to 5 measures. Work on them has progressed and for the most part these measures are a step forward, however they are not without their shortcomings.

The Directive adopted for Measure A provides for the right to interpretation (in line with the ECHR) and the right to translation which goes beyond the text of the ECHR taking a dynamic view and codifying ECtHR jurisprudence. However, in terms of the EAW, the national authorities are left to determine what is ‘necessary’ and whether a decision to surrender is in fact a ‘judgment’ to be translated.

⁸⁹² Valsamis Mitsilegas, *General Report: The Area of Freedom, Security and Justice from Amsterdam to Lisbon, Challenges of Implementation, Constitutionality and Fundamental Rights*, FIDE 2012, 4

Measure B's Directive on the right to information encompasses many of the defence rights set out above. There is a division between those rights governed by the Directive (Article 3) and those left to the national laws (Article 4). When compared its recitals and provisions exhibit a schizophrenic approach to the extent of rights applicable to EAWs.

Measures C and D on legal representation and communication with certain individuals, was watered it down by the Council. However, following the tripartite discussions, the standards were restored including in relation to the right to dual representation in both E-MS and I-MS, the deletion of derogations from confidentiality of lawyer-client meetings and the use of statements made during the initial police questioning in the absence of legal advice.

With the consultation on pre-trial detention for Measure F complete, it appears that MSs have no appetite for legislation on alternatives to custody, believing that their national laws can cope. On the other hand, civil society feels that the practice is inconsistent and would benefit from EU legislation. There are also mixed views on common standards for pre-trial-detention, MSs do not want maximum periods set whereas NGOs regard this as desirable. On whether detention conditions could be a ground to refuse surrender, MS agree that it could, but only in exceptional circumstances and the caselaw does not supported the claim that it is an issue. Overall NGOs are supportive of adopting common standards to promote uniform practice and support MR, a point most MSs seem to miss.

Whilst commendable, the Stockholm measures are not in themselves a panacea and cannot redress the balance alone. They address the essential procedural guarantees, but for obvious reasons they did not attempt to tackle all aspects. A prime example is the provision of bail and specifically the conditions which, MSs and citizens need to be confident will not be implemented in a discriminatory manner. The length of pre-trial

detention varies dramatically across the EU MSs and although MSs may not want the length of time to be harmonized, minimum standards regulating review of detention and the granting of bail will need to work in parallel with the ESO.

When assessing the fairness of proceedings they are ordinarily considered as a whole. However, in cross border cases the proceedings are broken up into parts which although closely linked (with the individual and offence being the common factor), they are at the same time separate. MR and mutual trust erect the barriers permitting only the extended reach of the I-MS's decisions.

European criminal law “creates a space that is neither one jurisdiction nor another, but an infinite set of combinations and amalgamations”.⁸⁹³ Arguably what it creates is an infinite combination and amalgamations of spaces within which requested individuals are placed. The result is that any given case will be subjected to a pick and mix of investigations, arrests, questioning, cautions and trials. As Hodgson sets out, national criminal justice systems normally focus on certain stages of the proceedings and inadequacies at one stage are balanced by safeguards at another stage. When a case is subjected to different jurisdictions, these inadequacies risk not been balanced. These differences are most obvious, but not exclusively, between adversarial and inquisitorial systems.⁸⁹⁴ Access to a lawyer, in particular at the preliminary stages is a difference that has been highlighted recently. In the common law system where the police investigation is not subject to external supervision, defence rights are strong with access to a lawyer guaranteed and police questioning always tape recorded.

This staggering or division of criminal proceedings means that guarantees need to apply at all stages. Each stage is capable of being compartmentalized. Currently the I-MS and E-MS only partner up to facilitate the crime fighting and not the HRs protection. Each

⁸⁹³ Hodgson (n886)

⁸⁹⁴ These differences are set out by Hodgson (n886)

national system has its own means by which to rectify interferences with procedural guarantees. In the I-MS they may come into effect at different stages of the proceedings and may not be able to be applied to interferences which occurred extraterritorially and which they did not commit – despite their ability to extend the reach of their criminal law extraterritorially.

The standardisation of safeguards at all stages of the criminal proceedings at the EU level will assist in promoting the integrity of the criminal procedure as a whole in the new transnational landscape. Stronger safeguards can only increase the credibility of the criminal justice systems and strengthen cooperation between MSs.

The EAW does not function in isolation, it lies at the heart of criminal proceedings with a cross-border nexus (the offence or the individual). As such the EAWFD should never have been a standalone measure, by its nature it needs to be part of a package. In addition to HRs, flanking measures are necessary. To date those adopted cover the full scope of criminal proceedings from pre-trial to post-trial. Overcrowding plaguing prisons of most MSs is likely to make it hard to resist surrender on the basis of general detention conditions. However, as alternatives are increasingly available through the ESO, Transfer of Prisoners FD and Financial Penalties FD, individuals will have access to a modified surrender enabling them to serve their sentence near family or to pay a financial penalty or be supervised pre-trial instead of having to leave their life (and employment). The important object is to ensure that the theory behind these measures is effective in practice.

Family rights can also be facilitated through alternatives available to surrender and custody. Under the EAWFD three alternatives are offered, the conditional surrender with return to serve any sentence imposed or the takeover of a sentence already handed down. The forum bar is another alternative and at pre-trial stages the ESO is also

available. The EU needs to continue working on joining the dots between treaty rights and MR measures, taking into account the rights of EU citizens and the scales for expulsion set out in the Citizens Directive.

Given that the EAWFD was adopted to counter serious transnational crime, it has been deployed for less serious crimes and to an extent which the drafters could not have predicted.⁸⁹⁵ With the expanding MR portfolio the EAWFD is only part of the HRs lacunae. EU HRs measures need to delve deeper into the system safeguards, in line with the ECtHR principle of equivalent protection, the EU has the responsibility to ensure that the necessary safeguards are put in place to balance the increased powers over the individual.

The ‘let's take their word for it now and deal with the consequences later’ approach, is not of much use to individuals who are separated from their families, lose their jobs, are detained in Art 3 prohibited treatment or are subjected to an unfair hearings. HRs must be protected and violations prevented at the first opportunity, rights cannot be recalled at a later date when the system fails a quality control test. Individuals are not products and the consequences of their ill treatment cannot always be isolated but may also impact innocent individuals. “Reports of the Council of Europe on European prisons show that prisons are not equally crowded”⁸⁹⁶ and as such depending on which MS an individual serves their sentence the conditions will not be equally degrading across the EU. MR provides a veil behind which MSs can hide to avoid both investigation by other MSs but also to turn a blind eye ignoring their obligations under the ECHR.

The calls for reform of a system which effects thousands a year has come from all quarters. At a regional level they have come from the Council of Europe and EU

⁸⁹⁵ The available statistics are interestingly analysed in Sergio Carrera, Elspeth Guild, Nicholas Hernanz, *Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System*, CEPS Special Reports, 29.03.2013

⁸⁹⁶ Marguery (n509) 91

institutions. At a national level, the UK Judicial Committee on HRs also calls for reform, including the adoption of a proportionality test and to avoid the rubber stamping of decisions by other MSs.

The current legislation and practice places MR above HRs, a rebalance of the system is required. Judges make their decisions independent of the government policies of the day.⁸⁹⁷ Despite the fact that governments may be keen to apply MR, judges are also aware of the HRs burden placed on their shoulders.

MR functions to regulate the underworld of the Union, reflecting the other side of the EU. Within this ‘fifth freedom’ individuals seek to exploit the dissolving borders for their own criminal activities. To deal with those taking advantage of this clandestine fifth freedom the EU’s adoption of MR in criminal matters also flips the freedoms in their favour and thereby engaging them to the detriment of individuals. Whilst there is no doubt that in order to protect the internal security of the EU, measures with a cross-border nexus are required, MSs should strive to ensure that in their implementation of the measures they continue to uphold the general principles and values which are common to them and form the foundation of the Union. These ensure respect for the rule of law and for HRs. In doing so a high level of confidence can develop between all actors in the Union including authorities, judges and citizens. Such confidence will assist in the free flow of goods, services, people, decisions and sanctions.

The missing link between justice and Mutual Trust is the gap between paper and practice. MR is not as easy to implement in criminal law because the subject matter is not a glass bottle or an alcoholic drink but human beings. The adoption of minimum rules set out at EU level will go some way in closing this gap. However, if the EU and

⁸⁹⁷ A recent reminder of this fact can be found in the words of the Court of Appeal;
Public policy, as contemplated in the Regulation, cannot be determined by the current thinking of the government of the day as to what is an expedient foreign policy. To allow that would itself be a breach of a rule of law essential in the legal order of the United Kingdom (Krombach).
Meletios Apostolides v David Charles Orams and Linda Elizabeth Orams [2010] EWCA Civ 9 at §66

MSs want their ‘star’ measure to continue to shine brightly they need to ensure that its implementation enriches not only the arsenal of judicial enforcement but also of citizen protection.

Annexes

Annex 1: Extracts from the TFEU

Article 67 (ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Article 82 TFEU

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

[...]

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Extracts from the Lisbon Treaty relating to enforcement mechanisms

Article 258 (ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 260 (ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfill its

obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Annex 2: Extracts from the ECHRArticle 3 Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13 Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Annex 3: Extracts from the Extradition Act 2003**Section 2**

(4)The statement is one that—

(a) particulars of the person's identity;

(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

Annex 4: Table on prison populations across the EU

EU Member State	On Remand (%)	Total non-national prisoners (%)
Austria	21.2	46.4
Belgium	35	41.1
Bulgaria	9.9	41.1
Cyprus (Republic of)	44.6	58.9
Czech Republic	10.5	7.2
Denmark average	24.15	21.7
Estonia	20.3	40.3
Finland	18.1	13.3
France	21.6	17.8
Germany	15.8	26.7
Greece	31.2	57.1
Hungary	28.3	3.4
Ireland (Republic of)	16	13.6
Italy	40.4	36.2
Latvia	30	1.3
Lithuania	13.1	1.1
Luxembourg	38.2	68.7
Malta	64	40.1
Netherlands	40.6	26.2
Poland	9.4	0.7
Portugal	20	20
Romania	10.8	0.7
Slovakia	14.6	2
Slovenia	22.7	11.7
Spain	15.8	34.1
Sweden	22.8	27.6
UK average	27.68	13.5
Total	666.73	672.5
Average	24.6937037	24.90740741

Annex 5: Extracts from the Charter of Fundamental Rights**Article 4 Prohibition of torture and inhuman or degrading treatment or punishment**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 24 The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48 Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49 Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50 Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Article 51 Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52 Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental

Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53 Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54 Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Annex 7: Extracts from the Crime and Courts Act 2013 – the Forum Bar
 SCHEDULE 20 Extradition

Part 1 Forum

Extradition to category 1 territories

1Part 1 of the Extradition Act 2003 (extradition to category 1 territories) is amended as follows.

2In section 11 (bars to extradition)—

(a) at the end of subsection (1) insert—

“(j) forum.”;

(b) after subsection (1) insert—

“(1A)But the judge is to decide whether the person’s extradition is barred by reason of forum only in a case where the Part 1 warrant contains the statement referred to in section 2(3) (warrant issued for purposes of prosecution for offence in category 1 territory).”;

(c) in subsection (2), for the words from “12” to “apply” substitute “12 to 19F apply”.

3 After section 19A insert—

“19BForum

(1)The extradition of a person (“D”) to a category 1 territory is barred by reason of forum if the extradition would not be in the interests of justice.

(2)For the purposes of this section, the extradition would not be in the interests of justice if the judge—

(a) decides that a substantial measure of D’s relevant activity was performed in the United Kingdom; and

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice—

(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;

(b) the interests of any victims of the extradition offence;

(c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;

(d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;

(e) any delay that might result from proceeding in one jurisdiction rather than another;

(f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to—

(i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and

(ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom;

(g) D's connections with the United Kingdom.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 1 territory concerned.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party

to the proceedings on the question of whether D's extradition is barred by reason of forum.

(6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and which is alleged to have been performed by D.

19C Effect of prosecutor's certificates on forum proceedings

(1) The judge hearing proceedings under section 19B (the "forum proceedings") must decide that the extradition is not barred by reason of forum if (at a time when the judge has not yet decided the proceedings) the judge receives a prosecutor's certificate relating to the extradition.

(2) That duty to decide the forum proceedings in that way is subject to the determination of any question relating to the prosecutor's certificate raised in accordance with section 19E.

(3) A designated prosecutor may apply for the forum proceedings to be adjourned for the purpose of assisting that or any other designated prosecutor—

(a) in considering whether to give a prosecutor's certificate relating to the extradition,

(b) in giving such a certificate, or

(c) in sending such a certificate to the judge.

(4) If such an application is made, the judge must—

(a) adjourn the forum proceedings until the application is decided; and

(b) continue the adjournment, for such period as appears to the judge to be reasonable, if the application is granted.

(5) But the judge must end the adjournment if the application is not granted.

19D Prosecutor's certificates

(1) A “prosecutor’s certificate” is a certificate given by a designated prosecutor which—

(a) certifies both matter A and matter B, and

(b) certifies either matter C or matter D.

(2) Matter A is that a responsible prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or a part of the United Kingdom, in respect of the conduct constituting the extradition offence.

(3) Matter B is that the responsible prosecutor has decided that there are one or more such offences that correspond to the extradition offence (the “corresponding offences”).

(4) Matter C is that—

(a) the responsible prosecutor has made a formal decision as to the prosecution of D for the corresponding offences,

(b) that decision is that D should not be prosecuted for the corresponding offences, and

(c) the reason for that decision is a belief that—

(i) there would be insufficient admissible evidence for the prosecution; or

(ii) the prosecution would not be in the public interest.

(5) Matter D is that the responsible prosecutor believes that D should not be prosecuted for the corresponding offences because there are concerns about the disclosure of sensitive material in—

(a) the prosecution of D for the corresponding offences, or

(b) any other proceedings.

(6) In relation to the extradition of any person to a category 1 territory, neither this section nor any other rule of law (whether or not contained in an enactment) may require a designated prosecutor—

(a) to consider any matter relevant to giving a prosecutor’s certificate; or

(b) to consider whether to give a prosecutor's certificate.

(7) In this section "sensitive material" means material which appears to the responsible prosecutor to be sensitive, including material appearing to be sensitive on grounds relating to—

(a) national security,

(b) international relations, or

(c) the prevention or detection of crime (including grounds relating to the identification or activities of witnesses, informants or any other persons supplying information to the police or any other law enforcement agency who may be in danger if their identities are revealed).

19E Questioning of prosecutor's certificate

(1) No decision of a designated prosecutor relating to a prosecutor's certificate in respect of D's extradition (a "relevant certification decision") may be questioned except on an appeal under section 26 against an order for that extradition.

(2) In England and Wales, and Northern Ireland, for the purpose of—

(a) determining whether to give permission for a relevant certification decision to be questioned, and

(b) determining any such question (if that permission is given), the High Court must apply the procedures and principles which would be applied by it on an application for judicial review.

(3) In Scotland, for the purpose of determining any questioning of a relevant certification decision, the High Court must apply the procedures and principles that would be applied by it on an application for judicial review.

(4) In a case where the High Court quashes a prosecutor's certificate, the High Court is to decide the question of whether or not the extradition is barred by reason of forum.

(5) Where the High Court is required to decide that question by virtue of subsection (4)—

(a) sections 19B to 19D and this section apply in relation to that decision (with the appropriate modifications) as they apply to a decision by a judge; and

(b) in particular—

(i) a reference in this section to an appeal under section 26 has effect as a reference to an appeal under section 32 to the Supreme Court;

(ii) a reference in this section to the High Court has effect as a reference to the Supreme Court.

19F Interpretation of sections 19B to 19E

(1) This section applies for the purposes of sections 19B to 19E (and this section).

(2) These expressions have the meanings given—

“D” has the meaning given in section 19B(1);

“designated prosecutor” means—

(a) a member of the Crown Prosecution Service, or

(b) any other person who—

(i) is a prosecutor designated for the purposes of this section by order made by the Secretary of State, or

(ii) is within a description of prosecutors so designated;

“extradition offence” means the offence specified in the Part 1 warrant (including the conduct that constitutes the extradition offence);

“forum proceedings” has the meaning given in section 19C(1);

“part of the United Kingdom” means—

(a) England and Wales;

(b) Scotland;

(c) Northern Ireland;

“prosecutor” means a person who has responsibility for prosecuting offences in any part of the United Kingdom (whether or not the person also has other responsibilities);

“prosecutor’s certificate” has the meaning given in section 19D(1);

“responsible prosecutor”, in relation to a prosecutor’s certificate, means—

(a) the designated prosecutor giving the certificate, or

(b) another designated prosecutor.

(3) In determining for any purpose whether an offence corresponds to the extradition offence, regard must be had, in particular, to the nature and seriousness of the two offences.

(4) A reference to a formal decision as to the prosecution of D for an offence is a reference to a decision (made after complying with, in particular, any applicable requirement concerning a code of practice) that D should, or should not, be prosecuted for the offence.”

Annex 8: Key Characteristics of the European Supervisory Order

The ESO states that it lays down rules for the MR of a decision on supervision measures, for the monitoring of such measures and the surrender of the person should they breach any of the measures (Article 1).

These measures are listed and include restrictions on movement and contact (Article 8).

In recognition of the different supervision measures across the EU, it permits the executing MS to adapt measures, but must ensure that they correspond as far as possible (Article 13).

The list of 32 offences for which dual criminality must not be verified, is the same as the EAWFD, however they must be punishable for at least 3 years in the issuing MS (Article 14).

An exhaustive list of grounds for non-recognition is also set out (Article 15).

The issuing MS maintains competence for subsequent decisions on the measures such as whether to renew, review, withdrawal, modify or to issue an EAW. It should be noted that it is not compulsory for a MS to use the ESO and the individual concerned has no right for the ESO to be used in the course of criminal proceedings against them (Article 2(2)).

Bibliography

Books

- Arnall, Anthony and others (Eds)**, *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011
- Christou, Theodora**, *European Cross Border Justice: A Case Study of the EAW*, 2010
- Clayton, Richard and Tomlinson, Hugh**, *Fair Trial Rights*, 2001
- Clayton, Richard and Tomlinson, Hugh**, *The Law of Human Rights*, 2009
- Colvin, Madeline and Cooper, Jonathan (Eds)**, *Human Rights in the Investigation and Prosecution of Crime*, 2009
- Conte, Alex and Burchill, Richard**, *Defining Civil and Political Rights*, 2009
- de Wet, E.**, 'Holding the United Nations Security Council accountable for human rights violations through domestic and regional courts: a case of 'be careful what you wish for'', in J. Farrall, K. Rubenstein (Eds.), *Sanctions, accountability and governance in a globalised world*, 2009
- Eckes, Christina**, *EU Counter-Terrorist Policies and Fundamental Rights*, 2009
- Farrall, J., Rubenstein, K.**, (Eds.), *Sanctions, accountability and governance in a globalised world*, 2009
- Ginter, Jaan**, 'Chapter 1: The Content of a EAW' in Keijzer and van Sliedregt, *The European Arrest Warrant in Practice*, 2009
- Guild, Elspeth and Martin, Luisa** (Ed.), *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Wolf Legal Publishers, The Netherlands, 2009
- Harris, D J et al**, *Law of the European Convention on Human Rights*, 2009
- Keijzer, Nico and Elies van Sliedregt**, *The European Arrest Warrant in Practice*, The Hague: TMC Asser Press, 2009
- Keijzer, Nico**, *Origination of the EAW Framework Decision*, in Guild, Elspeth and Martin, Luisa (Ed.), *Wolf Legal Publishers, The Netherlands*, 2009
- Lazowski, Adam and Nash, Susan**, 'Chapter 3: Detention,' in Keijzer and van Sliedregt, *The European Arrest Warrant in Practice*, 2009
- Leach, Philip**, *Taking a Case to the European Court of Human Rights*, 2005
- Malik, Martin**, *Crime, Rights and the EU*, London: Justice, 2008
- Mitsilegas, Valsamis**, *EU Criminal Law*, Hart Publishing, 2009
- Mole, Nuala and Harby, Catharina**, *A guide to the implementation of Article 6 of the European Convention on Human Rights*, Human rights handbooks, No. 3, Council of Europe, 2006
- Panzavolta, Michele**, 'Chapter 11: Humanitarian Concerns within the EAW System',

Keijzer and van Sliedregt **Peers, Steve**, *EU Justice and Home Affairs Law*, (3rd Edn), OUP, 2011

Reid, Karen, *A Practitioner's Guide to the European Convention on Human Rights*, 2009

Roagna, Ivana, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe human rights handbook, 2012

Sotto Maior, Mariana, *Chapter 12: The Principle of Proportionality: Alternative measures to the EAW*, in Keijzer and van Sliedregt, *The European Arrest Warrant in Practice*, 2009

Spencer, John, 'EU Criminal Law – the Past and the Future?', in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (Eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011

Spencer, John, 'EU Criminal Law – the Past and the Future?', in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (Eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, 2011

Spronken, Taru, *An EU-Wide Letter of Rights, Towards Best Practice (Ius Commune Europaeum)*, Intersentia, 2010

Tridimas, Takis, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in Evelyn Ellis (ed), *The Principle of Proportionality*, 1999

van Dijk, Peter et al, *Theory and Practice of the European Convention on Human Rights*, 2006

Weber, M, in Roth, G and Wittich, C, *Economy and Society*, Vol.1. California: University of California Press, 1978

Journal Articles and Reports

Adda, Michael.K and Grief, Nicholas, *Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?* *European Journal of International Law* 9 (1998), 510-524

Ahluwalia, Navtej Singh, *Directive 2004/38 and the Right of Free Movement*, *Tooks Chambers*, 2006

Ahmed, Tawhida and de Jesus Butler, Israel, *The European Union and Human Rights: An International Law Perspective*, *EJIL* (2006), Vol. 17 No.4, 771-801

Alegre, Susie, *Human rights and the future of extradition in the European Union: Implications of recent case law in the United Kingdom, France and Spain*, *ERA-Forum* Volume 4, Number 4, 63-69, 2004

Alegre, Susie, Ivanova, Ivanka and Denis-Smith, Dana, *Safeguarding the Rule of Law in an Enlarged EU The Cases of Bulgaria and Romania*, *CEPS Special Report/April 2009*. Available for free downloading from the CEPS website (<http://www.ceps.eu>)

Alleweldt, Ralf, *Protection against Expulsion under Article 3 of the European Convention on Human Rights*, *4 European Journal of International Law* (1993) 360-376

- Apap, Joanna and Carrera, Sergio**, *Judicial Cooperation in Criminal Matters, European Arrest Warrant, A good Testing Ground for Mutual Recognition in the Enlarged EU?* (2004) CEPS Policy Brief No. 46
- Arnell, Paul**, *The Law of Extradition*, S.L.T. (2012) 13
- Azarov, Valentina**, *Introductory note to United Kingdom House of Lords: E.M. (Lebanon) v Sec'y of State of the Home Dep't*, International Legal Materials, Vol.48, No. 1 (2009), 30-32
- Baker, Sir Scott, Perry, David and Doobay, Anand**, *A Review Of The United Kingdom's Extradition Arrangements*, presented to the Home Secretary on 30 September 2011
- Bapuly, Bedanna**, *The European Arrest Warrant under Constitutional Attack*, 3 Vienna Online J. on Int'l Const. L. 4 2009
- Besselink, Leonard F.M.**, *The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, FIDE Congress, 2012
- Bird, Annie**, Third state responsibility for human rights violations, European Journal of International Law, (2010) 883
- Borgers, P. M**, *Mutual recognition of the European Court of Justice*, European Journal of Crime, Criminal Law and Criminology, 2010
- Brems, Eva**, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Human Rights Quarterly, Volume 27, Number 1, February 2005, pp. 294-326
- Bryan, Ian and Langford, Peter**, *The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights*, Nordic Journal of International Law 80 (2011) 193-218
- Buono, Laviero**, *From Tampere to The Hague and beyond: towards the Stockholm Programme in the area of freedom, security and justice*, ERA Forum 10 (2009): 333-342
- Butler, Israel De Jesus**, *Securing human rights in the face of international integration*, ICLQ 2011, 60(1), 125-65
- Callewaert, Johan**, *The European Court of Human Rights and the Area of Freedom, Security and Justice*, ERA Forum (2007) 8:511–518
- Cape, Ed and others**, *Effective Criminal Defence in Europe*, Ius Commune: European and Comparative Law Series
- Carrera, Sergio, Guild, Elspeth, Hernanz, Nicholas**, *Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System*, CEPS Special Reports, 29 March 2013
- Christou, Theodora and Weis, Karen**, *The European Arrest Warrant and Fundamental Rights: An Opportunity for Clarity*, New Journal of European Criminal Law , Vol. 1/1, 2010, pp.31-44.

- Conway, Gerard**, Judicial interpretation and the third pillar: Ireland's acceptance of the European arrest warrant and the Gozutok and Brugge case. *European Journal of Crime, Criminal Law and Criminal Justice*, 13(2):255–283, May 2005.
- Costello, Cathryn**, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, *Human Rights Law Review* 6:1 (2006), 87-130
- Croquet, Nicolas A. J.**, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, *HRLR* 11 (2011), 91-131
- Cullen, Peter and Buono, Laviero**, *Creating an Area of Criminal Justice in the EU: Putting Principles into Practice*, *ERA Forum* (2007) 8:169–176
- Cullen, Peter and Buono, Laviero**, *Creating an Area of Criminal Justice in the EU: Putting Principles into Practice*, *ERA Forum* (2007) 8:169–176
- De Bondt, Wendy and Gert Vermeuulen**, *Appreciating Approximation: Using common offence concepts to facilitate police and judicial cooperation*, *EU and International Crime Control: Topical Issues, Governance of Security Research Paper Series Volume 4*, 2010
- Deen-Racsmany, Zsuzsanna**, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, 14 *Eur. J. Crime Crim. L. & Crim. Just.* 271 2006
- Denza, Eileen**, *The 2000 Convention on Mutual Assistance in Criminal Matters*, *Common Market Law Review*, Vol.40, 2003, pp.1047-1074
- Douglas-Scott, Sionaidh**, *The European Union and Human Rights after the Treaty of Lisbon*, *Human Rights Law Review* (2011) 11 (4): 645-682
- Du-Bois Pedain, Antje**, *The Right To Family Life In Extradition Cases: More Defendant-Friendly Than Strasbourg Requires*, *The Cambridge Law Journal* (2010), 69: 223-225
- Dugard, John and van den Wyngaert, Christine**, *Reconciling Extradition with Human Rights*, *American Journal of International Law* (1998) Vol 92 No 2, 187-212
- Editor**, *The Constitutional Implications of Mutual Above Recognition in Criminal Matters in the EU*, *Common Market Law Review*, Vol 43, 2006, p1277-1311
- Eeckhout, Piet**, *The EU Charter of Fundamental Rights and the Federal Question*, *Common Market Law Review* 39: 945-994, 2002
- Elsen, Charles**, *From Maastricht to The Hague: the politics of judicial and police cooperation*, *ERA Forum* (2007) 8:13 –26
- Fahey, Elaine**, *How to Be a Third Pillar Guardian of Fundamental Rights? The Irish Supreme Court and the European Arrest Warrant* (March 16, 2011)
- Fichera, Massimo**, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, *European Law Journal*, Vol. 15, No. 1, January 2009, pp. 70-97
- Fiore, Paola**, *The Fourth Round of Mutual Evaluation Carried out by the Council of the European Union of the Practical Application of the European Arrest Warrant*, *ERA Forum* (2007) 8:225–232
- Fletcher, Maria**, *Some Developments to the ne bis in idem Principle in the European Union:*

Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge, Modern Law Review
, Vol 66, 2003, pp.769-780

Foster, Steve, *Ahmad v United Kingdom*, Case Comment, Cov.L.J. 31 (2010)

Gallagher, Paul, *Future developments in judicial cooperation in criminal matters*, ERA Forum
(2009) 9: 495–517

Geyer, Florian, *European Arrest Warrant: Court of Justice of the European Communities
Judgment of 3 May 2007, Case C-303/05*, European Constitutional Law Review 4
(2008): 149-161

Gibbs, A. H., *Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice*, European
Law Journal, 17: 121–137 (2011)

Gibbs, Alun Howard, *Reasoned 'Balance' in Europe's Area of Freedom, Security and Justice*,
European Law Journal, 17: 121–137, 2011

Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-
Constitutional Overview of ECHR and EU Law before National Courts*, Eur J Int Law
(2012) 23 (2): 401-424

Greer, Steven, *The Right to Silence: A Review of the Current Debate*, MLR Volume 53 No 6,
November 1990.

Guild, Ellspeth and Carrera, Sergio, *Towards the Next Phase of the EU's Area of Freedom,
Security and Justice: The European Commission's Proposals for the Stockholm
Programme*, CEPS Policy Brief No. 196, 20 August 2009

Guild, Elspeth, *Crime and the EU's Constitutional Future in an Area of Freedom, Security, and
Justice*, European Law Journal, (2004) Vol.10 No.2, 218-234, 219

Harfield, Clive, *From Empire to Europe: Evolving British policy in respect of cross-border
crime*, The Journal of Policy History, 19.2 (2007): 180-206

Harpaz, Guy, *The European Court of Justice and the its Relationship with the European Court
of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy*,
Common Market Law Review 46: 105-141, 2009

Herlin-Karnell, Ester, *European Arrest Warrant Cases and the Principles of Non-
Discrimination and EU Citizenship*, The Modern Law Review, Vol. 73, Issue 5, pp. 824-
835, September 2010

Heusel, Wolfgang (Editor), *The Future of Legal Europe: An emerging European judicial
culture? Contributions to the panel discussion "The Future of Legal Europe: New
Challenges for Justice in Europe"*, ERA Forum (2008) 9:109–125

Hildebrandt, Mireille, *European criminal law and European identity*, Crim Law and Philos
(2007) 1:57–78

Hinarejos, Alicia, *Recent Human Rights Developments in the EU Courts: The Charter of
Fundamental Rights, the European Arrest Warrant and Terror Lists*, Human Rights Law
Review 7:4 (2007), 793-811

Hinarejos, Alicia, Spencer, J.R., Peers, Steve, *Opting Out of EU Criminal Law: What is
actually involved?*, CELS Working Paper, (2012) New Series, No 1

Hodgson, Jacqueline, *Safeguarding Suspects' Rights in Europe: A Comparative Perspective*,

New Criminal Law Review, (2011) Vol. 14, Number 4, 611-65

- House of Lords EU Committee**, *The Treaty of Lisbon: An Impact Assessment*, Volume 1, 10th Report, Session 2007-08 HL Paper 62-1; Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, OUP, 2010
- House of Commons European Scrutiny Committee**, 36th Report together with formal minutes, (HC 2010–12, 428-xxxii), 20-30 (Right of access to a lawyer and right to communicate on arrest)
- House of Commons Research Paper 00/32**, *Human Rights in the EU: the Charter of Fundamental Rights*, 20 March 2000
- House of Commons**, Home Affairs Committee. *First Report*, London, Session 2002-03
- House of Lords and House of Commons Joint Committee on Human Rights**, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, 22 June 2011
- House of Lords and House of Commons Joint Committee on Human Rights**, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, 22 June 2011
- House of Lords EU Committee**, *Procedural Rights in Criminal Proceedings*, 1st Report, Session 2004–05.
- House of Lords House of Commons Joint Committee on Human Rights**, *The Human Rights Implications of UK Extradition Policy*, Fifteenth Report of Session 2010–12, HL Paper 156 HC 767, Published on 22 June 2011
- House of Lords**, EU Committee, 30th Report of Session 2005–06, *European Arrest Warrant: Recent Developments, Report with Evidence*, 4 April 2006, citing the Letter of 22 February 2006 from Mr Andy Burnham MP, Parliamentary Under Secretary of State, Home Office, printed with the Report.
- House of Lords**, Select Committee on European Union, *Tenth Report*, London, 2005
- Impala, F**, *The European arrest Warrant in the Italian Legal System: Between mutual recognition and mutual fear within the European area of Freedom*, Security and Justice, 1 Utrecht Law Review (2005)
- Jimeno-Bulnes, Mar**, The enforcement of the european arrest warrant: A comparison between Spain and the UK. *European Journal of Crime, Criminal Law and Criminal Justice*, 15(3):263–307, 2007
- Johnston, Jeffrey**, *The risk of torture as a basis for refusing extradition and the use of diplomatic assurances to protect against torture after 9/11*, International Criminal Law Review, Volume 11, Number 1, 2011 , pp. 1-48(48)
- Kapfere, Sibylle**, *The Interface Between Extradition and Asylum*, UNHCR, PPLA/2003/05, November 2003
- Kaunert, Christian**, 'Without the Power of Purse or Sword': *The European Arrest Warrant and the Role of the Commission*, Journal of European Integration (2007) 29(4): 387-404
- Klimas, T., & Vaiciukaite, J**, *The Law of Recitals in European Community Legislation*, ILSA Journal of International and Comparative Law, (2008) Vol 15:1

- Klip, Andre and Wilt, H van der (Eds)**, *Harmonisation and Harmonising Measures in Criminal Law*, Royal Netherlands Academy of Arts and Science,(2002)
- Komárek, Jan**, *European Constitutionalism And The European Arrest Warrant: In Search Of The Limits Of “Contrapunctual Principles”*, *Common Market Law Review* 44: 9–40, 2007
- Konstadinides, Theodore**, *The Perils of the 'Europeanisation' of Extradition Procedures in the EU: Mutuality, Fundamental Rights and Constitutional Guarantees*, *Maastricht Journal of European and Comparative Law*, Vol. 14, p. 179, 2007
- Kramer, Xandra E.**, *Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure*, *International Journal of Procedural Law* 2011(2), 202-230
- Ladenburger, Clemens**, *FIDE 2012 – Session on "Protection of Fundamental Rights post-Lisbon*
- Langford , Ian**, *Fair trial: The history of an idea*, *Journal of Human Rights*, 8(1):37–52
- Langford, Peter**, *Extradition and fundamental rights: the perspective of the European Court of Human Rights*, *The International Journal of Human Rights*, (2009) 13: 4, pp.512-529
- Lavenex, Sandra and Wagner, Wolfgang**, *'Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice'*, *European Security*, (2007)16: 3, 225-243
- Lavenex, Sandra**, *Mutual recognition and the monopoly of force: limits of the single market analogy*, *Journal of European Public Policy*, Vol 14, No 4, 2007, 762-779
- Lenaerts, Koen**, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, *International and Comparative Law Quarterly*, (2010) Vol. 59, 255-301
- Ljungquist, Thomas**, *Mutual Recognition of Non-Custodial Pre-Trial Supervision Measures in the European Union*, *Revue Internationale de Droit Penal*, (2006) Vol.66, 170-175
- Lock, Tobias**, *Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention of Human Rights*, *Human Rights Law Review* 10 (2010), 529-45
- Lock, Tobias**, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 *CMLRev* (2011)1025, Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, *The Modern Law Review*, (2013)76: 254–285
- Löf, Robin**, *Shooting from the Hip: Minimum Rights in Criminal Proceedings throughout the EU*, *European Law Journal*, (2006) Vol. 12 No 3, 421-430, 422
- Lord Bingham**, *The Rule of Law*, *The Cambridge Law Journal*, (2007) Volume 66, Issue 1, 67-85
- Luchtman, Michiel J.J.P.**, *Choice of Forum in an Area of Freedom, Security and Justice*, *Utrecht Law Review*, Vol. 7, No. 1, pp. 74-101, 2011
- Mackarel, Mark**, *The European arrest warrant the early years: Implementing and using the warrant*, *European Journal of Crime, Criminal Law and Criminal Justice*, 15(1):37–65,

2007

- Marguery, Tony**, *EU Citizenship and the European Arrest Warrant: The Same Rights for All?* Merkourios (2011) Volume 27 Issue 73, 84-91
- Marin, Luisa**, *'A Spectre is Haunting Europe': European Citizenship in the Area of Freedom, Security and Justice - Some Reflections on the Principles of Non Discrimination (on the basis of nationality), Mutual Recognition and Mutual Trust Originating from the European Arrest Warrant*, European Public Law, Vol. 4
- Massimo Fichera**, The European arrest warrant and the sovereign state: A marriage of convenience? *European Law Journal*, 15(1):70–97
- Mathisen, Gjermund**, *On the Fairness of Proceedings for Extradition or Surrender*, European Human Rights Law Review, Vol. 15, No. 5, pp. 486-494, 2010
- Megie, Antoine**, *Replacing and Displacing the Law: The Europeanisation of Judicial Power*, CEPS Special Report, (2009) 3
- Milanovic, Marko**, *Extradition and Life Imprisonment*, CLJ [2009]
- Mitsilegas, Valsamis**, *Constitutional Principles of the European Community and European Criminal Law*, European Journal of Law Reform, (2007) Vol. VIII, No. 2/3, 301-323
- Mitsilegas, Valsamis**, *General Report: The Area of Freedom, Security and Justice from Amsterdam to Lisbon, Challenges of Implementation, Constitutionality and Fundamental Rights*, FIDE 2012
- Mitsilegas, Valsamis**, *The Constitutional Implications of Mutual Above Recognition in Criminal Matters in the EU*, (2006) 43 C.M.L. Rev. 1277-1311
- Mitsilegas, Valsamis**, *The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?*, Queen Mary School of Law Legal Studies Research Paper No. 33/2009; European Law Review, (2009) Vol. 34 No. 4, 537
- Mole, N, Meredith, C and Akhavan-Tabib, M**, *Handbook on European law relating to asylum, borders and immigration*, Fundamental Rights Agency, 2013
- Morano-Foadi, Sonia and Andreadasaki, Stelios**, *The convergence of the European legal system in the treatment of third country nationals in Europe: the ECJ and ECtHR jurisprudence*, EJIL, (2011) 22(4), 1071-1088
- Mowbray, Alistair**, *A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights*, H.R.L. Rev. (2010) 289
- Mulgrew, Roisin**, *The international movement of prisoners*, Criminal Law Forum, 2011
- Nascimbene, Bruno**, *European judicial cooperation in criminal matters: What protection for individuals under the Lisbon Treaty?*, ERA Forum (2009) 10: 397–407
- Nicholaides, Kalypso**, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, Jean Monnet Paper, 1997
- Nicolaides, K and Schaffer, G**, *Transnational Mutual Recognition Regimes: Governance Without Global Government, Law and Contemporary Problems*, Vol. 68:263, 2005

- Nilsson, Hans G.**, 3. *From classical judicial cooperation to mutual recognition*, *Revue internationale de droit pénal* 2006/1-2 (Vol. 77)
- Nußberger, Angelika**, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, *I•CON*, (2008) Volume 6, Number 1, 162–170
- Obama, President Barak**, *President Barack Obama's Inaugural Address*, January 21, 2009
- OSCE**, *Background Paper on Extradition and Human Rights in the context of Counter-Terrorism*, Workshop held in Vienna 22-23 March 2007, ODIHR.GAL/22/07, 20 March 2007
- Padfield, Nicola**, *The European Arrest Warrant: Between Trust and Democracy and the Rule of Law – Implementation of the European Arrest Warrant in England and Wales*, *European Constitutional Law Review*, (2007) 3:253-268
- Palombella, Gianluigi**, *The rule of law beyond the state: Failures, promises, and theory*, *I•CON* July 2009 Vol. 7: 442
- Paterson, Neil and Vermeulen, Gert**, *Differences In Material Detention Conditions & Sentence Execution – A Threat To The Area Of Freedom, Security & Justice?*, 2010
- Peers, Steve**, *Criminal suspects' rights and EU Law*, *ERA-Forum* Volume 5, Number 4, 520-532 2004
- Peers, Steve**, *Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?*, *Common Market Law Review*, (2004) Vol 41 5-36,14
- Peers, Steve**, *The UK's planned 'block opt-out' from EU justice and policing measures in 2014*, *Statewatch Analysis*, 2012
- Pérignon, Isabelle and Daucé, Constance**, *The European Arrest Warrant: a growing success story*, *ERA Forum* (2007) 8:203–214
- Plachta, Michael**, *European Arrest Warrant: Revolution in Extradition?*, *European Journal of Crime Criminal Law and Criminal Justice*, (2003), Volume 11 Issue 2, 178-194
- Poiares, Maduro**, *So Close and Yet so Far: The paradoxes of Mutual Recognition*, *Journal of European Public Policy*, (2007) Vol 14, no 5, 814-25
- Pollivino, Oreste**, *EAW and Constitutional Principles of the Member States: A case law-based outline in the attempt to strike the right balance between interacting legal systems*, *German Law Journal*, (2008) Vol.09 No.10 1316
- Raab, Dominic**, *Cooperation not Control: The Case for Britain Retaining Democratic Control over EU crime and Policing Policy*, *Open Europe*, 2013
- Reding, Viviane**, *Putting Victims first – Better protection and support for victims of crime*, Trier, 2011, Speech/11/424
- Roper, Steven D., Ane Maria Røddik Christensen**, *Judicial Accommodation of Human Rights in the European Union Copenhagen*: DJOF Publishing, 2007 *Hum Rights Rev* (2009) 10:303–304
- Rusu, Ion**, *The European Arrest Warrant According to the Latest Changes and Additions*, *EIRP Proceedings*, Vol 5 (2010)

- Samuels, Alec**, *Challenging the European Arrest Warrant*, C.L&J. (2011) 175 JPN 673
- Sanger, Andrew**, *Force of Circumstance: The European Arrest Warrant and Human Rights, Democracy and Security*, (2010) 6:1, 17-51, 43
- Sarmiento, Daniel**, *European Union: The European Arrest Warrant and the quest for constitutional coherence*, I•CON, Volume 6, Number 1, 2008, pp. 171–183
- Satzger, Helmut and Pohl, Tobias**, *The German constitutional court and the European arrest warrant 'Cryptic Signals' from Karlsruhe*, Journal of International Criminal Justice, 4(4):686–701, September 2006
- Select Committee on European Union**, *Tenth Report*, London: House of Lords, 2005
- Servent, Ariadna Ripoll**, *Point of no return? The European Parliament after Lisbon and Stockholm*, European Security, (2010) 19: 2, 191 — 207
- Sievers, Julia**, *Managing Diversity: The European Arrest Warrant and the potential of mutual recognition as a mode of governance in EU Justice and Home Affairs*, EUSA Tenth Biennial International Conference in Montreal, Canada, 17-19 May 2007
- Skilbeck, Rupert**, *Frankenstein's Monster Creating a New International Procedure*, JICJ 8 (2010), 451-462
- Slidregt, Elies van**, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law*, European Constitutional Law Review, 2, 244-252, 2007
- Spencer, John**, *EU Fair Trial Rights - Progress at Last*, New Journal of European Criminal Law, (2010) Volume 1, Number 4, 447
- Spencer, John**, *Implementing the European Arrest Warrant: A Tale of How Not to Do it*, Statute Law Review, (2009) 30(3) 184-2002
- Spencer, John**, *The European Arrest Warrant*, Cambridge Yearbook of Legal Studies, (2003-4) 7, 201-217
- Stephens, Chris**, Case Comment, *We want you: extradition in the UK Supreme Court*, Edin. L.R. (2011) 133
- Tadic, FM**, *How Harmonious can Harmonisation be? A Theoretical Approach towards Harmonisation of (Criminal Law)*, in Klip, Andre and van der Wilt, H (Eds) *Harmonisation and Harmonising Measures in Criminal Law*, Royal Netherlands Academy of Arts and Sciences, 2002
- Thibaut, Florence, De La Barra, Flora, Gordon, Harvey, Cosyns, Paul, Bradford, John M. W. and The WFSBP Task Force on Sexual Disorders**, *The World Federation of Societies of Biological Psychiatry (WFSBP) Guidelines for the biological treatment of paraphilias*, The World Journal of Biological Psychiatry, (2010) 11: 604–655
- Thwaites, Nadine**, *Mutual Trust in Criminal Matters: the European Court of Justice gives a first interpretation of a provision of the Convention implementing the Schengen Agreement*, German Law Journal, , (2003) Vol 4, No 3, 253-262, 261
- Trachtman, Joel P.**, *Embedding Mutual Recognition at the WTO*, (2006)
- Tulkens, Françoise**, 'EU Accession to the European Convention on Human Rights', at European Judicial Training Network – Human Rights and Access to Justice Seminar

“Effective Remedies, Lengthy Proceedings and Access to Justice in the EU: Ensuring the right to a fair trial under the Charter of Fundamental Rights of the EU and the European Convention on Human Rights”, Poland, 1 March 2013,

Türküler Isiksel N., *Fundamental rights in the EU after Kadi and Al Barakaat*, European Law Journal, Vol. 16, No. 5, September 2010, pp. 551–577

UK Government Response to Sir Scott Baker’s Review of the United Kingdom’s Extradition Arrangements, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty October 2012, Cm 8458

van Puyenbroeck, Laurens and Vermeulen, Gert, *Towards minimum procedural guarantees for the defence in criminal proceedings in the EU*, ICLQ, (2011) 60(4). p.1017-1038

van Sliedregt, Elies, *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law*, European Constitutional Law Review, (2007) 3: 244-252

Vennemann, N., *The European Arrest Warrant and its Human Rights Implications*, 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2003) 103-121

Vermeulen, Gert and others, *Cross-border execution of Judgments Involving Deprivation of Liberty in the EU*, IRCP-series (2011) Volume 40

Vermeulen, Gert and others, *Material Detention Conditions, Execution of Custodial Sentences and Prison Transfer in the EU Member State*, IRCP-series (2011) Volume 41

Vernimmen Van- Tiggelen, Gisele and Laura Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union*, Study, Universite Libre de Bruxelles and ECLAN, 2008

Vervaele, John A.E., *The Transnational ne bis in idem Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights*, Utrecht Law Review, Vol. 1, No. 2, pp. 100-118, December 2005

Vogel, Joachim and JR Spencer, *Case Comment: Proportionality and the European arrest warrant*, Criminal Law Review 6 (2010): 474-482

Warbrick, Colin, *Recent developments in UK extradition law*, International and Comparative Law Quarterly, 56(1):199–208, January 2007

Warbrick, Colin, *The European Response to Terrorism in an Age of Human Rights*, EJIL (2004), Vol. 15 No. 5, 989–1018

Weber, Max. Roth, G and Wittich, C (Eds), *Economy and Society*, Vol.1, California: University of California Press, 1978

Weyembergh, Anne, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, Common Market Law Review, (2005) Vol.42, 1567-1597

Wolff, Sarah and van de Ven, Tim, *Building Mutual Trust in a European Rule of Law*, Paper: EU Policy Perspectives seminar series, CESP, The Hague, 7-8 April 2011

Wouters, Jan and Naert, F, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September"*, Common Market Law Review, Vol.41, 2004, pp.909-935

Ziegler, Katja S., *Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, Human Rights Law Review (2009) 9 (2): 288-305

Zöller, Verena, *Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights*, German Law Journal Vol 05 No. 05 2004

Zuhlke, Susanne and Pastille, Jens-Christian, *Extradition and the European Convention – Soering Revisited*, Max-Planck-Institute, 1999

Zupančič, Boštjan M. and Callewaert, Johan, *Relationship of the EU Framework Decision to the ECHR: Towards the fundamental principles of criminal procedure*, ERA Forum (2007) 8:265–271

UN Documents

Report on Ireland, CAT/C/ IRL/CO/1, 17 June 2011

Report on France, CAT/C/FRA/CO/4-6

UN Model Treaty on Extradition (A/RES/45/116, 68th plenary meeting, 14 December 1990)

EU Documents

European Commission, *Mutual Recognition of final decisions in criminal matters*, COM (2000) 495

European Commission, *Political orientation debate on issues arising from the Commission's report of 23 February 2005, based its evaluation of the European Arrest Warrant ("EAW") and the surrender procedures between Member States and subsequent Member State responses*, Doc. no 8569/05 COPEN 89

Council (Justice and Home Affairs), *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] - General approach 10908/12*, COPEN 136, 8 June 2012

Council of Ministers (JHA), *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, adopted 30 November 2000, 2001/C 12/02

Council of Ministers, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters*, 30 November 2000 [2001] OJ C 12/10

Council of the EU (Justice and Home Affairs), 3172nd Council meeting, Brussels, 7 and 8 June 2012, PRES/12/241

Council of the EU, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings 2009/C 295/01*, OJ

C 295/1 4 December 2009 (Stockholm Roadmap).

Council of the EU, *Council Programme*, Official Journal C 012 , 15/01/2001 P. 0010 – 0022

Council of the EU, *Final version of the European handbook on how to issue a European arrest Warrant, 2008*

Council of the EU, Justice and Home Affairs, 3111th Council Meeting, Brussels, 22-23 September 2011, PRES/11/320

Council of the EU, Justice and Home Affairs, 3121st Council Meeting, Luxembourg, 27 and 28 October 2011, PRES/11/397

Council of the EU, Justice and Home Affairs, 3135th Council Meeting, Brussels, 13-14 December 2011, PRES/11/491

Council of the EU, *Tampere European Council, Presidency Conclusions of the Tampere European Council*, 1999

Council, *Cardiff European Council, Presidency Conclusions*, SN150/1/98 REV 1 EN, 15-16 June 1998, §39

Council, *Conclusions and Plan of Action*, (2001) SN 140/01

Council, Council of the EU, *Presidency Conclusions of the Tampere European Council*, 1999

Council, *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, adopted 30 November 2000 by the Council of Ministers (JHA)*, [2001] OJ C 12/10

Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C 53/01, OJ

Draft Charter of Fundamental Rights of the European Union, Note from the Praesidium, CHARTE 4473/00 CONVENT 49, 2000

EU Committee on Civil Liberties, Justice and Home Affairs, *Report with a proposal for a European Parliament recommendation to the Council on development of an EU criminal justice area*, 2009

EU Committee on Civil Liberties, Justice and Home Affairs, *Report with a proposal for a European Parliament recommendation to the Council on evaluation of the European arrest warrant*, 2006

EU Network of Independent Experts on Fundamental Rights (CFR-CDF), *Opinion no. 3-2006: The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe ('Extraordinary Renditions')*, 25 May 2006, Cfr-cdf.opinion3.2006

European Commission Staff Working Document, *Annex to the Report From The Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, COM(2005) 63 final, 23.02.2005

European Commission Staff Working Document, *Annex to the Report From The Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2005) 63 final

European Commission Staff Working Document, *Impact Assessment accompanying the Proposal for a Directive of the European*, 7

European Commission Staff Working Paper, *Proposal for a Framework decision on certain procedural*

rights in criminal proceedings throughout the European Union, Extended Impact Assessment, COM(2004)328 final SEC(2004) 491, 28.4.2004, 4

European Commission, *Explanatory Memorandum, Proposal For a Directive Of The European Parliament and of the Council on the Right to Information in Criminal Proceedings*, Com(2010) 392 Final, 20 July 2010

European Commission, *Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11 July 2007 COM(2007) 407 final

European Commission, *Analysis of the Replies to the Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention*, 2012

European Commission, *Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*, COM(2010) 392 final SEC(2010) 908, Brussels 20.7.2010 SEC(2010)907, 7

European Commission, *Commission Staff Working Paper, Impact Assessment Accompanying The Proposal For A Directive of The European Parliament and of the Council on the Rights of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings*, COM(2011) 326 final SEC(2011) 687 final. See also Commission Staff Working Paper, *Executive Summary of the Impact Assessment*, SEC(2011) 687, 8.6.2011

European Commission, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401, final, 2.6.2004

European Commission, *Communication from the Commission to the Council and the European Parliament, final Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401, 2.6.2004

European Commission, *Communication from the Commission to the Council and the European Parliament of 10 May 2005 - The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM (2005) 184, final, 2005

European Commission, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations* (COM(2004) 401 final), 2 June 2004

European Commission, *Communication from the Commission to the Council and the European Parliament Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000) 495 final, 26 July 2000, 2

European Commission, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM (2004) 401 final, 2 June 2004

European Commission, *Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, COM(2011) 326 final, 8.6.2011

European Commission, *Green Paper from the Commission*, COM(2003) 75 final

European Commission, *Green Paper from the Commission, Procedural Safeguards for Suspects and*

Defendants in Criminal Proceedings throughout the European Union, Brussels, 19 February 2003 COM(2003) 75 final

- European Commission, *Green Paper, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention* COM(2011) 327 final, Brussels, 14.6.2011 OJ, 2007/C 303/17
- European Commission, *Mutual Recognition of final decisions in criminal matters*, COM (2000) 495
- European Commission, *Progress Report, Proposal For a Directive Of The European Parliament and of the Council on the Right to Information in Criminal Proceedings*, COPEN 254, 3 December 2012
- European Commission, *Proposal for a Framework decision on certain procedural rights in criminal proceedings throughout the European Union - Extended Impact Assessment*, 9318/04 COPEN 61 + ADD 1
- European Commission, *Report from the Commission of 23 February 2005 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2005) 63 final
- European Commission, *Report from the Commission of 24 January 2006 based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version)* COM(2006) 8 final
- European Commission, *Report From The Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2007) 407 final
- European Commission, *Report from the Commission to the European Parliament and the Council of 11 April 2011 on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* COM(2011) 175 final
- European Commission, *Report from the Commission to the European Parliament and the Council, On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11 April 2011, COM(2011) 175 final
- European Commission, *Towards an Area of Freedom, Security and Justice*, COM(1998) 459 final, July 1998
- European Economic and Social Committee, *Opinion on the Right of access to a lawyer and right to communicate upon arrest on the Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest* COM(2011) 326 final – 2011/0154(COD), SOC/424, 7 December 2011
- European Parliament, *Political orientation debate on issues arising from the Commission's report of 23 February 2005, based its evaluation of the European Arrest Warrant ("EAW") and the surrender procedures between Member States and subsequent Member State responses*, 19 May 2005, COPEN 89, 2
- European Parliament, *AMENDMENTS 44 - 177 on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, (PE474.063v02-00), 2011/0154(COD), 22.3.2012

- European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), Rapporteur: Birgit Sippel, *DRAFT REPORT on the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings*, 2010/0215(COD), 20.12.2010
- European Parliament, *Directive of the European Parliament and of the Council on the right to information in criminal proceedings*, Common Guidelines, COPEN 372, 9 March 2012
- European Parliament, Legal Affairs Committee (JURE), Jan Philipp Albrecht (Rapporteur), *Opinion on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, JURI_AD(2011)473811, 2.12.2011
- European Parliament, LIBE, Elena Oana Antonescu (Rapporteur), *Draft Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, A7-0000/2012, 7.2.2012.
- European Parliament, *Parliament and of the Council on the right to information in criminal proceedings*, COM(2010) 392 final 20 July 2010
- Fundamental Rights Agency, *The Stockholm Programme: A chance to put fundamental rights protection right in the centre of the European Agenda*, 14 July 2009
- JURE, *Draft Opinion* JURI_PA(2011)473811, 07.10.2011 and JURE, *Amendments 15 - 44 - Draft opinion*, JURI_AM(2011)475965, 17.11.2011
- Justice and Home Affairs Council, *Conclusions*, SN 3926/6/01, REV 6, 20 September 2001
- Presidency of the Council, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] – Questions on selected issues 7564/13*, COPEN41, 21 March 2013
- Presidency, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - State of play 15812/11*, COPEN282, 21 October 2011
- Presidency, *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Progress report 18215/11*, COPEN 355, 6 December 2011
- Text of the explanations relating to the complete text of the Charter Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, CONVENT 49 11 October 2000

Council of Europe Documents

- CCDH, *Draft Explanatory Report*, CDDH-UE(2011)16 §40
- CCDH, Study of Technical and Legal Issues Of A Possible EC/EU Accession To The European Convention On Human Rights, Report adopted by the Steering Committee for Human Rights (CDDH), DG-II(2002)006 [CDDH(2002)010 Addendum 2]
- CDDH, Informal Working Group On The Accession Of The European Union To The European

- Convention On Human Rights (CDDH-UE), *Final Version Draft legal instruments on the accession of the European Union to the European Convention on Human Rights*, CDDH-UE(2011)16. Presented at the 8th Working Meeting of the CDDH-EU with The European Commission, 20 June-24 June 2011
- Council of Europe Committee of Ministers, Recommendation (2006)2 on European Prison Rules Council of Europe Committee of Ministers, Recommendation (2006)13 on the use of remand in custody
- Council of Europe, Fifth Negotiation Meeting Between The CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, *Final report to the CDDH*, 47+1(2013)008, Strasbourg, 5 April 2013
- Council of Europe, Parliamentary Assembly, *Recommendation 1741 (2006)1 on Social reintegration of prisoners*, adopted by the Assembly on 11 April 2006 (11th Sitting)
- Council of Europe, *Practical Guide on Admissibility Criteria*, 2011
- Council of Europe, Social, Health and Family Affairs Committee, *Report on Social reintegration of prisoners*, Doc. 10838, 7 February 2006
- CPT Standards – “Substantive” sections of the CPT’s General Reports, CPT/Inf/E (2002) 1 Rev. 2009; CPT, Report Germany, CPT (2006) 36, adopted on 7 July 2006
- CPT, Report to the Czech Government on the visit to the Czech Republic carried out by the CPT from 25 March to 2 April 2008, CPT/Inf (2009) 8
- CPT, Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 15 to 19 December 2008, published, 30 September 2010, CPT/Inf (2010) 29
- CPT, Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009, published, 17 November 2010, CPT/Inf (2010) 33
- CPT, Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 8 December 2009, published 9 July 2011, CPT/Inf (2011) 22
- CPT, Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 November to 8 December 2009, published, 12 July 2011, CPT/Inf (2011) 20, p. 12
- European Court of Human Rights, *Annual Report 2010*, Registry of the Court, (2011)
- Secretariat of the Council of Europe, *Opinion on the Commission’s Proposal for a Directive of the European Parliament and of the Council on “the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest”*, Strasbourg, 9 November 2011